No. 80-1082

Supreme Court, U. S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In a state criminal prosecution, after a hearing, a trial judge concluded beyond a reasonable doubt that prosecutorial misconduct had not in any way prejudiced the defendant. Has a federal court departed from governing legal principles and unjustifiably interfered in a state criminal prosecution when, without disagreeing with the state trial judge's finding that there was no prejudice, it nonetheless grants habeas corpus relief merely because it disapproves of the prosecutor's conduct?

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney on behalf of the State of New York and Harold J. Smith, Superintendent of Attica Correctional Facility, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (App. A, *infra*, la-12a) is not yet reported. The opinion of the United States District Court for the Southern District of New York (App. B, *infra*, 13a-29a) is reported at 485 F. Supp. 1365. The opinion of the state trial judge denying the motion to set aside the conviction (App. E, *infra*, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S. 2d 906. The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of Chief Judge Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, *infra*, 58a-59a). Rehearing was denied on December 8, 1980 (App. G, *infra*, 60a-61a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Statement

On Christmas Eve 1968, on New York's fashionable upper east side, in an apartment used as a house of prostitution, a pimp named Jimmy Smith and Sharon Stango, a prostitute, were shot in the head at point blank range and killed and a customer, Charles Gonzalez, was shot and left to die by a then unknown gunman with no apparent motive. After the shooting, the gunman calmly rang for the elevator, rode down to the lobby, thanked a handyman for opening the door for him and walked off into the night.

Gonzalez survived the shooting but, along with the doorman and handyman, could provide the police with only a composite sketch of the killer and a general description of the clothes he wore. In addition, one of Smith's other employees suggested that the killer might have been a police officer.

The investigation proved fruitless until 1971. In that year, the highly publicized Knapp Commission, which was appointed in 1970 by Mayor Lindsay to investigate police corruption in New York City, held a series of televised hearings. One of the star witnesses was police officer Wil-

liam Phillips, who agreed to cooperate after having been caught shaking down a notorious prostitute by commission investigators.

During his televised testimony, Phillips was seen by a detective, assigned to investigate the Smith-Stango murders, who believed that Phillips fit the composite sketch of the killer. A subsequent investigation showed that Phillips had been "shaking down" Smith for years, but in late 1968 Smith had refused to make further payments. The day before the murders, according to a woman who worked for Smith, a man whom she identified as Phillips threatened to "blow Smith's . . . head off" if Smith did not pay $1,000 the following day. In addition, the surviving victim as well as the handyman identified Phillips as the killer.

Phillips was indicted and brought to trial. All of the evidence specified above was introduced. Phillips testified in his own behalf, denied committing the murders and had an alibi supported by several witnesses. The jury reported itself deadlocked (10-2 for acquittal) and a mistrial was declared.

Between the first and second trials, there came to light evidence which destroyed Phillips' alibi as well as evidence showing that he, despite his denial, had possessed a sweater identical in color to that worn by the killer. The second trial resulted in conviction for both murders and the attempted murder and Phillips was subsequently sentenced to a term of from twenty-five years to life imprisonment.

The State Post-Judgment Proceedings

About two weeks after conviction, Richard Kuh, the District Attorney of New York County, learned that during trial the trial prosecutor knew but did not disclose that a juror had applied by letter for a job with the prosecutor's office. Mr. Kuh immediately informed both the trial judge and defense counsel about the letter. An extensive hearing was held, at which both the juror and the trial prosecutor were fully cross-examined.

Juror John Dana Smith, a Vietnam veteran who was about to graduate from Columbia University, had been accepted by the defense even though he had said that he was actively seeking employment as a federal law enforcement officer and had had dealings with the New York County District Attorney's Office when he worked as a store detective. During trial, upon learning that the District Attorney's Office was hiring investigators, Smith sent a letter applying for a position without mentioning his juror status. He believed that the application had nothing to do with his duty as a juror and that the trial prosecutor would have no reason to know about the application. At the hearing, he stated unequivocally that the application had no effect whatsoever on his deliberations or verdict. Smith did not hear from the prosecutor's office until after trial because the trial prosecutor, having been informed of the application, directed that no one have any contact with the juror until the trial's conclusion.

Also on the jury was a man named Bethel who, the trial prosecutor discovered during trial, was a defendant in a

pending misdemeanor drug possession case and who had agreed to testify against the seller of drugs in exchange for dismissal of his case. The prosecutor informed the court and defense counsel about Bethel, and he was excused and replaced by an alternate.

Even though there were other alternates available, however, the trial prosecutor believed that juror Smith had revealed fully on voir dire his desire to be a law enforcement officer. The trial prosecutor did not inform the court or defense counsel of Smith's application for a job because it was consistent with his disclosure on voir dire and because no one from the prosecutor's office had contacted the juror.

The trial judge found that Smith had been incredibly naive in sending the letter. Still, the judge credited Smith's "faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney and ignore the possible construction which might be placed on such action" (App. E, *infra*, 43a-44a). In addition, the court found that the prosecutor had made a "serious error in judgment" by failing to disclose the letter. Nonetheless, in a lengthy and carefully reasoned opinion, following both state and federal cases, the judge denied the motion to set aside the verdict, concluding beyond a reasonable doubt that the juror had been impartial (*id.* at 57a). The conviction was affirmed on appeal (52 A.D.2d 758, 384 N.Y.S.2d 715 [1976]), and Chief Judge Breitel denied leave to appeal to the Court of Appeals (39 N.Y.2d 949, 386 N.Y.S.2d 1039 [1976]).

The Federal Habeas Corpus Proceeding

The District Court Decision

On April 5, 1979, Phillips sought habeas corpus review in the United States District Court for the Southern District of New York. The thrust of the petition was that the State had used allegedly immunized testimony at trial in violation of Phillips' privilege against self-incrimination. On May 25, 1979, Phillips filed what he called a "supplemental petition" "to raise every possible federal issue." In this petition, after merely stating the facts adduced at the post-trial hearing, Phillips alleged in conclusory fashion that he was denied due process of law by juror Smith's participation on the jury.

Judge Lawrence Pierce did not reach the claim based on the alleged immunized testimony. Judge Pierce concluded that the record supported fully the trial court's finding that Smith's judgment was not influenced by his application and that Smith was therefore not actually biased. Judge Pierce noted that petitioner had ample opportunity to adduce evidence of actual bias, and that the trial judge, who concluded that there was no actual bias, had observed the demeanor of all the witnesses, including juror Smith, who testified at the post-verdict hearing (App. B, *infra*, 25a).

Despite the fully supported conclusion that Smith was in fact an unbiased juror, Judge Pierce believed it necessary to determine whether Smith was "impliedly biased." Judge Pierce then found that there was a "conclusive presumption" of bias (*id.* at 26a) because "it is reasonable to

ported to the judge during trial, there was a substantial likelihood that the judge would have excused the juror. On the other hand, at a post-verdict hearing, it was not likely that the judge would set aside the verdict because of the juror's application (*id.* at 7a, 10a). Thus, according to the majority, Phillips was prejudiced by the prosecutor's failure to disclose, notwithstanding the fully supported conclusion that the juror was actually impartial (*id.* at 10a).

In dissent, Judge Van Graafeiland agreed that the trial prosecutor had been wrong in not disclosing the juror's application but concluded that this failure had not prejudiced Phillips because the juror was found to have been actually impartial. Judge Van Graafeiland made the point, undisputed by the majority, that the state post-trial hearing into the juror's impartiality was precisely the procedure required by this Court as well as the Second Circuit (*id.* at 11a). Given the majority's assumption that the state hearing record could support the trial judge's finding of impartiality, it was clear that habeas corpus was granted solely because of prosecutorial misconduct regardless of prejudice, of which there was none (*id.* at 12a). Consequently, since there was no prejudice, Judge Van Graafeiland believed that rather than interpreting the Constitution, the majority was exercising supervisory powers over the administration of justice in the state courts, thereby usurping the power of the state judiciary (*id.* at 12a).

On October 10, 1980, the State sought rehearing and rehearing *en banc*, which the Court of Appeals denied on December 8, 1980. On December 12, 1980, the Second Circuit granted a motion for a stay of the mandate provided

a petition for certiorari was filed within twenty days. This Petition will have been filed on December 31, 1980 or January 1, 1981.*

Reasons for Granting the Writ

The decision in this case expands federal habeas corpus review of state convictions to permit federal courts to exercise supervisory power over the conduct of state prosecutors by nullifying convictions even though the challenged conduct did not affect the outcome of the trial. Such an expansion poses a serious threat to federal-state comity and has so far departed from accepted constitutional principles and statutory requirements as to call for review by this Court. The decision is a gross departure from these principles because it directly conflicts with no fewer than three decisions of this Court—*Remmer* v. *United States*, 347 U.S. 227 (1954), *United States* v. *Agurs*, 427 U.S. 97 (1976) and *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974)—and directly contravenes the statutory requirements governing habeas corpus. 28 U.S.C. 2254.

In the *Remmer* case (*supra*) this Court recognized that a post-verdict hearing on a juror's bias is the appropriate remedy when a juror has allegedly been influenced or en-

* Phillips has remained in custody throughout the federal proceedings. After the district court granted habeas corpus relief, he unsuccessfully sought bail from state court, as well as the district court, the Circuit Court of Appeals and Mr. Justice Marshall. After the Circuit Court affirmed the judgment granting habeas corpus, a state Supreme Court justice granted bail. However, the Appellate Division of the New York State Supreme Court prohibited petitioner's release because the grant of habeas corpus did not become effective until issuance of the mandate; thus, there were still valid state convictions for murder and state law prohibited bail for persons so convicted. Subsequently, the Second Circuit denied motions for bail or immediate issuance of the mandate and then stayed the mandate pending an application for certiorari.

gaged in misconduct during trial. In that case the Court ordered a post-trial hearing into the impartiality of a juror after the prosecutor informed the trial judge, but the judge failed to inform the defense, about a purported attempt to influence the juror and a follow-up FBI investigation which included an interview of the juror. Indeed, there is an entire body of federal law recognizing the appropriateness of post-verdict inquiry in cases involving juror misconduct during trial. *See, e.g., United States* v. *Johns,* 615 F.2d 672, 676 (5th Cir. 1980); *United States* v. *Gross,* 614 F.2d 365, 368 (3d Cir. 1980), *cert denied,*——U.S. ——, 100 S.Ct. 3019 (1980); *Sullivan* v. *Fogg,* 613 F.2d 465, 467 (2d Cir. 1980). In the instant case the state court held the post-trial hearing required by *Remmer* and concluded beyond a reasonable doubt that the juror was impartial.

True, in *Remmer,* the failure to hold a hearing at trial on whether the juror had been influenced resulted from a judicial error, and in the other cases the failure occurred because of a juror's conduct which was not discovered until after trial. Here the failure to hold a hearing resulted from a prosecutor's serious error in judgment. Nonetheless, if a post-trial hearing is the constitutional remedy for the failure to hold a mid-trial hearing because of an error by a judge or juror, there is no reason why a post-trial hearing should not be the appropriate constitutional remedy when the fault for not having a hearing at trial lies with the prosecutor. To overcome this inescapable conclusion, the court below not only ignored *Remmer,* but also misapplied *United States* v. *Agurs, supra,* which requires a showing of prejudice before prosecutorial misconduct mandates a new trial.

The *Agurs* case defined the duty of a prosecutor to disclose evidence that would likely affect the jury. A defend-

ant has a constitutional right to have exculpatory evidence considered by a jury and thus by definition, the duty to disclose material evidence defined the remedy for its breach. Once the jury had been discharged, only a new trial, before a new jury, could cure the prejudice of a verdict which might have been obtained as the result of the prosecutor's failure to disclose material evidence.

The court below used *Agurs* to define the constitutional duty to disclose information which would have had a "fair likelihood" of affecting a judge's determination concerning a juror's impartiality (App. A, *infra*, at 10a). Having so used *Agurs*, the court below found it simple to conclude, as in *Agurs*, that here only a new trial could remedy the prejudice, if any, suffered as the result of the prosecutor's breach of duty. This simple conclusion was erroneous. Factual questions involving guilt or innocence require resolution by a jury after a new trial. On the other hand, determinations by a judge, such as a finding respecting a juror's impartiality, can be made at a post-trial hearing without an entire new trial. Thus, a defendant suffers no prejudice if the only result of a prosecutor's failure to disclose is that the hearing regarding possible juror bias is postponed until after trial. As noted by the dissent below, this is the principle enunciated by the *Remmer* line of cases, a principle unfortunately ignored by the majority.

The *Remmer* line of cases stands for the additional principle that only when there is a finding that a juror was not impartial is a new trial required. Here, the state judge concluded beyond a reasonable doubt that the juror in question was impartial, a conclusion which the district court found fully supported by the record and which the court below never disputed.

Given the finding of impartiality, the prosecutor's failure to disclose did not prejudice Phillips; because the juror was impartial, Phillips has been convicted by twelve impartial jurors. The Constitution requires no more. As Judge Van Graafeiland in the dissent below correctly concluded, in the absence of a biased juror, whose participation would have rendered the trial unfair, the Constitution does not require a new trial even if the prosecutor acted reprehensibly in failing to disclose the application (App. A, *infra*, 12a). This is so because, as this Court has made clear and the majority below ignored, the governing constitutional principle in cases involving failure to disclose exculpatory evidence "is not punishment of society for misdeeds of a prosecutor but avoidance of any unfair trial to the accused." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *accord, United States* v. *Agurs*, 427 U.S. at 110, *supra*.

The majority opinion sought to finesse the *Agurs-Brady* requirement of prejudice by concluding that there was a "fair likelihood" that if informed of the juror's application during trial, the state judge would have exercised his discretion and replaced the juror (App. A, *infra*, 10a). Nevertheless, juror Smith was impartial and no prejudice could arise from denying the judge an opportunity to replace one impartial juror with another. Perhaps even more significant, and unmentioned by the majority, is that New York judges have no greater discretion to remove a juror during trial than do their federal counterparts.* Yet, a

* *Compare N.Y. Crim. Proc. Law* §270.35 *and People* v. *Genovese*, 10 N.Y.2d 478, 482-3; 180 N.E.2d 419, 422, 225 N.Y.S.2d 26, 29-30 (1962) *and People* v. *West*, 38 A.D.2d 548, 549; 327 N.Y.S.2d 493, 495, *aff'd*, 32 N.Y.2d 944, 300 N.E.2d 734, 347 N.Y.S.2d 203 (1973), *with United States* v. *Avila-Macias*, 577 F.2d 1384, 1387 (9th Circ. 1978) *and United States* v. *Moten*, 564 F.2d 620, 629 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977) *and Banks* v. *United States*, 204 F.2d 666, 671 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953).

post-trial hearing into juror misconduct is adequate to protect an accused's right to an impartial jury verdict in federal court. *See* cases cited at p. 10-11, *supra.** Surely, the majority deviated from applicable principles by its failure to treat the state post-trial hearing the same way. *Cf. Francis* v. *Henderson,* 425 U.S. 536, 541-42 (1976).

At the core of the majority's departure from accepted principles is its incorrect insistence that the crucial and only issue in this case was prosecutorial misconduct, not juror bias. From this false premise the majority seems to have concluded that even if the juror were actually impartial, the prosecutor's failure to disclose the job application by itself deprived the accused of due process (App. A, *infra,* 10a). This conclusion is difficult to understand. As shown above, the juror was in fact unbiased; thus, the conviction has not been obtained by the failure to disclose. Put simply, here there can be no constitutional violation without prejudice. The applicable statute authorizes the granting of habeas corpus only to persons in custody in violation

* Of course, inquiry into a juror's state of mind is a difficult matter, but that difficulty is present regardless whether the inquiry takes place before, during or after trial. There are many reasons why the post-trial hearing required by the *Remmer* case is as adequate as, if not more so than, a hearing during trial. In both hearings, the judge can observe the juror's reactions during trial as well as his or her demeanor during the hearing. Further, in both situations, the juror could be brought to the court without being told why, thereby preventing preparation for the particular inquiry. With respect to the post-trial hearing there are at least two other advantages. First, defense counsel, in cross-examining the juror, would not have to tread lightly in fear that, if his challenge were unsuccessful, then he would be stuck with a juror who might well hold the cross-examination against his client. Second, at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern. Indeed, here counsel was given wide latitude to explore as he saw fit.

of the Constitution. 28 U.S.C. 2254. Accordingly, Phillips was not entitled to habeas corpus relief.

Of course, a court having supervisory powers over the conduct of a prosecutor may desire to encourage future disclosure by punishing the prosecutor and ordering a new trial even though an accused would not otherwise have been entitled to one. Given the departure of the court below from accepted principles, the ineluctable conclusion is that this prophylactic device remains the only basis for the majority opinion. Indeed, Phillips expressly requested in his brief to the court below that it exercise such supervisory power (Brief for Appellee: 31). In accepting this invitation, the majority below, however, has brought itself into direct conflict with the applicable statute (28 U.S.C. 2254). Under that statute, habeas corpus review of a state court conviction based on prosecutorial misconduct is a "narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642, (1974).

In exercising this supervisory power despite recognizing that there was here no actual prejudice as required by the governing constitutional principles, the majority sought final refuge in a reference to the "appearance of justice" (App. A, *infra* 10a). But as Justice Holmes knew, "if a man begins to talk about [justice] for one reason or another he is shirking thinking in legal terms." The Mind and Faith of Justice Holmes, p. 435 (Lerner ed. 1943). The majority below, in talking in this way, surely did shirk thinking in legal terms and reached a decision by exercising supervisory powers in conflict with the governing statute

and with accepted legal principles established by the *Agurs*, *Brady*, *DeChristoforo* and *Remmer* cases.

We recognize that certiorari is rarely granted and the record here shows that the trial prosecutor was clearly wrong. But that wrongful conduct did not prejudice Phillips and it makes poor sense and worse law to punish the people of New York State by requiring a new trial twelve years after the crime (with all of the attendant problems) for a corrupt police officer who was convicted of two murders on overwhelming proof of guilt by twelve jurors, not one of whom has been found to be anything but impartial. By seeking certiorari, we seek no vindication for the trial prosecutor. Rather, we seek vindication of the accepted legal principles from which the court below so clearly departed, thereby unjustifiably interfering in a most significant state criminal prosecution.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 31, 1980

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1303—September Term, 1979

(Argued June 16, 1980 Decided September 26, 1980)

Docket No. 80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent-Appellant.

Before:

OAKES, VAN GRAAFEILAND, *Circuit Judges,*
and NICKERSON, *District Judge**

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence

* United States District Judge for the Eastern District of New York, sitting by designation.

W. Pierce, Judge, granting petition for writ of habeas corpus, 485 F. Supp. 1365.

Affirmed.

ROBERT M. MORGENTHAU, District Attorney, New York County (Robert M. Pitler, Jerrold Tannenbaum, Assistant District Attorneys, of counsel) New York, New York, *for respondent-appellant*

WILLIAM M. KUNSTLER, Esq., New York, New York, *for petitioner-appellee*

NICKERSON, *District Judge:*

This is an appeal from a judgment entered on the order of the District Court, Lawrence W. Pierce, Judge, granting petitioner William R. Phillips a writ of habeas corpus unless he is retried.

Phillips, a former New York City police officer, was indicted by a New York County grand jury on March 29, 1972 for the 1968 murders of a pimp and a prostitute and for the attempted murder of a customer of the bordello where the crimes occurred. In August 1972 Phillips' first trial ended in a hung jury, deadlocked, he claims, ten to two for acquittal. On November 21, 1974, after a second trial of some seven weeks, he was convicted on all three counts. The convictions were affirmed without opinion, *People v. Phillips,* 52 App. Div.2d 758, 384 N.Y.S.2d 715 (1st Dept. 1976), and leave to appeal was denied. 29 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

In April 1979 he commenced this habeas corpus proceeding, pursuant to 28 U.S.C. § 2254, asserting, among other things, that he had been denied due process because during the second trial one of the jurors, John Dana Smith, applied

to the New York District Attorney's Office for a job as an investigator, a fact which the prosecutors knew but did not reveal to the trial judge or to Phillips' counsel. Judge Pierce conditionally granted the writ. 485 F. Supp. 1365.

Phillips' second trial commenced before New York State Supreme Court Justice Harold Birns on September 16, 1974. After ten days of voir dire, twelve jurors and four alternate jurors were selected. Although Smith indicated on voir dire an interest in pursuing a career in law enforcement, particularly with the federal government, he was not challenged by the defense and was chosen as juror number three.

On September 23, 1974, the day he was sworn as a juror, Smith had lunch with Criminal Court Officer Rudolph Fontane, who had attended John Jay College of Criminal Justice with Smith's wife. Fontane said that he was thinking of applying for a job as a rackets investigator in the District Attorney's Office and told Smith that a federally funded position for a major felony investigator had opened in that office. Smith said he was interested in the latter position.

Fontane made inquiries on behalf of Smith and himself as to the procedure for applying for a job as an investigator. He spoke first to Michael Mulderrig, an investigator in the District Attorney's Office, who said that an application and resume should be sent directly to the District Attorney. Fontane learned the same thing from Mario Piazza, a jury warden for the New York Supreme Court, who had spoken about the matter to John Lang, an Assistant District Attorney. Fontane reported what he had learned to Smith, and on October 22, 1974, after some three weeks of testimony, Smith wrote a letter to the New York

County District Attorney's Office stating, "I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator."

Smith gave his application to Fontane, assuming that Fontane would deliver it to a personal acquaintance in the District Attorney's Office. Instead, Fontane simply placed it in the mail, although he personally delivered his own application for the job of rackets investigator. Several days after the applications were submitted, Fontane met Smith and Piazza for lunch. Later that day or the next day, Piazza called Fontane and told him that Assistant District Attorney Joan Sudolnik was responsible for reviewing applications for employment in the Major Felony Program.

Smith's application was forwarded to the Administrative Assistant District Attorney, who, on his return from vacation on November 9, 1974, sent it to Sudolnik. Sudolnik referred the application to Lang. On November 13, 1974, Fontane met Assistant District Attorney Robert Holmes, spoke of Smith's application and mentioned, for the first time to a member of the District Attorney's staff, the fact that Smith was on the Phillips jury. Holmes promptly told this to Sudolnik, who instructed both her secretary and Lang that no one should correspond with Smith until after the trial. The next day, November 14, 1974, Sudolnik met with Jack Litman, the Assistant District Attorney prosecuting Phillips, and his assistant, Phillip LaPenta, and informed them of the situation.

Litman testified that he directed Sudolnik to make no response to the application and said that he did not wish to know about anything contained in Smith's resume. Lit-

Defense counsel moved to vacate the jury verdict. Justice Birns denied the motion after an extensive post-trial hearing. *People v. Phillips*, 87 Misc.2d 613, 384 N.Y.S. 2d 906 (1975).

Justice Birns concluded that there was "no evidence" that any member of the District Attorney's staff had a sinister or dishonest motive with respect to Smith's application, 87 Misc.2d at 619, 384 N.Y.S.2d at 910, and that sending the application, though "an indiscretion", 87 Misc.2d at 627, 384 N.Y.S.2d at 915, and "unprecedented imprudence", 87 Misc.2d at 631, 384 N.Y.S.2d at 918, did not constitute improper conduct by a juror under New York State law. In light of the voir dire revealing Smith's ambitions for a law enforcement career, Justice Birns found that the application "in no way reflected a premature conclusion as to defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence." 87 Misc.2d at 627, 384 N.Y.S.2d at 915.

Justice Birns also found that, although the prosecution should have informed the court and defense counsel of the application and although their failure to do so was "a serious error in judgment," 87 Misc.2d at 628, 384 N.Y.S.2d at 916, indeed, "unique misjudgment", 87 Misc.2d at 631, 384 N.Y.S.2d 918, as to the requirements of professional ethics, this failure was not such prosecutorial misconduct as to deprive Phillips of a fair trial or to prejudice his substantial rights.

In granting the writ, Judge Pierce held that, while there was insufficient evidence to support a finding that Smith was actually partial, he was impliedly biased because the "average" juror in his position "would indeed be likely to favor the prosecution's position—at least to some extent," 485 F. Supp. at 1372, and that Phillips was therefore held

in violation of the Sixth Amendment as incorporated in the due process clause of the Fourteenth Amendment. *Duncan v. Louisiana,* 391 U.S. 145 (1968).

Judge Pierce cited, among other authorities, *Tumey v. Ohio,* 273 U.S. 510, 532 (1927), in which the Supreme Court, deciding that due process requires disqualification of a judge with a pecuniary interest in finding against a defendant, stated "[e]very procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Given the human propensity, often subconscious, for self-justification, as well as the "psychological impact" of requiring an individual to state before others whether he was fair and impartial, *Irvin v. Dowd,* 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact "impartial." Indeed, following a seven week trial any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect. For these reasons, perhaps the law should apply the objective, prophylactic rule adopted by Judge Pierce. But we need not decide the point, for we are persuaded that, as contended by Phillips below and in the state courts, the failure of the prosecutors to disclose their knowledge denied him due process.

The requirements of disclosure which the due process clause imposes on a prosecutor have been dealt with in an analogous context in the line of cases commencing with *Brady v. Maryland,* 373 U.S. 83 (1963). The *Brady* case held that suppression by the prosecution of evidence re-

quested by the accused violated due process where the evidence was material to guilt or punishment, irrespective of the good or bad faith of the prosecution. The Court stated: "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87.

Subsequently, the opinion in *United States v. Agurs*, 427 U.S. 97 (1976), reemphasized this commitment to "fairness" for the accused. The Court pointed out that the *Brady* rule arguably applies in three distinct situations.

The first involves the knowing use of perjured testimony by the prosecution. A conviction so obtained is "fundamentally unfair", and must be set aside if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. *See also Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). The opinion in the *Agurs* case stated that this standard of materiality is applied "not just because prosecutorial misconduct" is involved, but more importantly because of the "corruption of the truth-seeking function of the trial process." 427 U.S. at 104.

The second situation, illustrated by the *Brady* case, is where the defense requests specific evidence. In those circumstances "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge," and "the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

The third situation is where, as in the *Agurs* case, there has been no specific request, in which event the prosecution has a duty to provide the defense with exculpatory evidence only if it "creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112. Agurs had been convicted for murder of one Sewell who, just before the killing, had been carrying two knives, including the one with which Agurs killed him. Agurs' counsel moved for a new trial, asserting he had discovered that Sewell had a prior record, including two guilty pleas to carrying deadly weapons, apparently knives. The prosecutor had not been requested to disclose and had not disclosed this record to the defense.

The Supreme Court held that there was no denial of due process, approving the trial court's finding that this evidence did not create a reasonable doubt that did not otherwise exist. The evidence did not contradict the prosecution's case and was largely cumulative.

For purposes of the present case what is significant in the *Agurs* opinion is its indication that had Sewell's prior record been requested and withheld Agurs would have been denied due process. Thus the standard of due process is not whether the defendant in the court's opinion was in fact guilty. The test is whether the defendant has received "fair" treatment. By deciding that a request for specific evidence must be honored the court held that to sanction the withholding by the prosecutor of specified evidence as to which there is a substantial basis for claiming materiality would not only be unfair to the defendant but would also impugn the integrity of the judicial process itself.

We think similar considerations are applicable in this case. Here the defense had no reason to believe a juror had applied to the prosecutor for a job and therefore no reason to request such information. But an impartial jury

is basic to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process. As in *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979), in which the convicted defendant alleged racial discrimination in the selection of the foreman of the grand jury, the "harm is not only to the accused" but "to society as a whole" when the "appearance of justice" is destroyed.

We may assume for purposes of argument that the trial judge might find after a hearing that the juror was of so staunch a character and of such extraordinary sensitivity and righteousness that his judgment would not be affected, even subconsciously, by his interest in his future employment. But it is not the prosecutor's function to predict what the court may find. His duty must be defined in objective terms. Where the facts indicate that an average juror might be prejudiced and there thus is a fair likelihood that the trial judge will exercise his discretion to substitute an alternate or declare a mistrial, the prosecution must divulge the facts upon which the exercise of that discretion depends.

No doubt there will be cases in which the prosecution receives innocuous information regarding a juror. While the prudent prosecutor will no doubt err on the side of disclosure, we do not suggest that a new trial will be required in every case. We merely hold that the prosecutor may not keep silent when he knows that a juror has applied to become his employee.

The judgment is affirmed.

VAN GRAAFEILAND, *Circuit Judge*, (dissenting):

In affirming the judgment herein, my colleagues have done exactly what the Supreme Court has said should not be done. They have measured the constitutional obligation of due process "by the moral culpability, or the willfulness, of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1976). They hold that the failure of the prosecutor to disclose his knowledge of a juror's job application denied petitioner due process regardless of whether the judgment of the juror in question was in fact affected by his interest in future employment so as to deprive petitioner of a fair trial. I cannot subscribe to this unwarranted expansion of the habeas corpus powers of the federal courts.

In *Remmer v. United States*, 347 U.S. 227 (1954), an FBI agent was sent into the jury room without the defendant's knowledge or consent to investigate a rumor concerning jury tampering. The Court recognized that sending an agent in to investigate a juror as to his conduct "is bound to impress the juror and is very apt to do so unduly." *Id.* at 229. It ordered that the trial judge be directed to hold a hearing so as to determine whether the incident was prejudicial and harmful to the defendant and if "it [was] found to have been harmful, to grant a new trial." *Id.* at 230. Since *Remmer*, this has been the generally approved procedure where there are reasonable grounds to suspect jury improprieties. *See, e.g., United States v. Johns*, 615 F.2d 672, 676 (5th Cir. 1980); *United States v. Gross*, 614 F.2d 365, 368 (3d Cir. 1980); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980). It was the procedure followed by the state court judge in this case.

The state judge held a hearing during which the challenged juror was examined. Following the hearing, the

judge found that the juror was not prejudiced or hostile and had made no premature determination of the defendant's guilt; that instead the juror was honest and able to render a verdict on the evidence. The judge concluded that petitioner had not been deprived of a fair trial. The district court likewise found that the record did not support petitioner's claim that the letter-writing juror was partial to the prosecutor's case.

My colleagues say this makes no difference and approve the granting of a writ solely because they find the state prosecutor's conduct to have been reprehensible. However, reprehensible conduct by a state prosecutor which has not deprived the defendant of a fair trial does not warrant federal habeas corpus relief. *Fambo v. Smith,* 565 F.2d 233, 235 (2d Cir. 1977). Our right to review state court proceedings is "the narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974), *quoting DeChristoforo v. Donnelly,* 473 F.2d 1236, 1238 (1973).

New York State Supreme Court judges are obligated and fully qualified to supervise the trial conduct of state prosecutors. Unless a prosecutor's conduct has so prejudiced a defendant as to deprive him of a fair trial, section 2254 gives a federal judge no right to usurp the state judge's function. *Borodine v. Douzanis,* 592 F.2d 1202, 1209-12 (1st Cir. 1979). The purpose of habeas corpus "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

I dissent.

APPENDIX B

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 79 Civ. 1782.

WILLIAM R. PHILLIPS,

Petitioner,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

March 13, 1980.

William M. Kunstler, New York City, for petitioner.

Robert M. Morgenthau, Dist. Atty. for New York County, by Jerrold Tannenbaum, Robert M. Pitler, Asst. Dist. Attys., New York City, for respondent.

PIERCE, District Judge.

OPINION AND ORDER

This petition for a writ of habeas corpus presents this Court with the serious question of whether a defendant charged with capital crimes in state court can receive a *fair trial* where one of the members of the jury, during the

course of the trial, sought some benefit from the prosecutor's office and where this fact became known to the prosecutor during the trial but was not communicated to defendant's counsel or to the court until after a verdict of guilty had been returned.

Petitioner William R. Phillips was convicted after a trial before a jury in State Supreme Court, New York County, on November 21, 1974, on two counts of murder and one count of attempted murder. He is presently serving concurrent sentences on those charges of up to a life term of imprisonment. He has petitioned for a writ of habeas corpus pursuant to sections 2241 and 2254 of Title 28, United States Code. In support thereof, he contends, first, that he was denied his constitutional right to a trial by an impartial jury and, therefore, to due process of law in that a member of the jury had applied for employment with the prosecutor's office during the course of the trial, which application, to the knowledge of the prosecutor, was still pending at the time the jury rendered its verdict against him. He further asserts that a second juror, while serving on the jury in this case, had agreed to testify on behalf of the prosecution in another, unrelated criminal action in exchange for immunity from prosecution for himself, petitioner not having been informed of this fact until the end of the prosecution's case against petitioner. Finally, petitioner contends that a tape recording of a conversation in which he was a participant should not have been admitted into evidence at his trial because he had previously been granted transactional immunity with respect to that conversation.

In the discussion that follows, petitioner's second and third contentions will not be addressed since this Court

finds, with respect to his first contention, that the fundamental constitutional requirements of a trial before an impartial jury and of due process of law were denied to petitioner based upon the undisputed fact that a juror filed an application for a job in the prosecutor's office after being selected to serve on the trial jury in this case, which application was still pending at the time the jury rendered its verdict. The Court notes that the prosecuting attorneys became aware of this information during the trial but did not reveal it to either the defendant or the trial court until after a verdict was rendered. The Court notes further that this issue might well have been avoided if the prosecuting attorneys had timely informed the trial judge of this matter since alternate jurors were available to replace this juror/job applicant before deliberations began.

FACTS[1]

On March 29, 1972, petitioner was indicted on charges of murder and attempted murder. Thereafter, on June 28, 1972, the first trial of petitioner on these charges was commenced in State Supreme Court, New York County. However, on August 9, 1972, the jury informed the court that it was unable to reach a verdict, and a mistrial was declared. Petitioner's second trial before a jury was commenced on September 16, 1974, before Justice Harold Birns. On November 21, 1974, the jury returned a verdict convicting

1. During the post-trial hearings before Justice Harold Birns in state court on petitioner's motion to vacate the verdict of the jury on the grounds of jury and prosecutorial misconduct, the testimony of all of the persons involved in the incidents set forth in the petition before this Court was taken. Inasmuch as the parties are in substantial agreement regarding the events in controversy, a separate hearing was not held by this Court on the present petition. The events described herein have been established from the record of the criminal proceedings against the petitioner in state court, including post-trial hearings.

petitioner of two counts of murder and one count of attempted murder. Both trials were prosecuted by the New York County District Attorney's Office.

During the course of the second jury trial, one of the jurors, John Dana Smith, was informed by one Rudy Fontaine of possible employment opportunities in the Major Felony Program of the New York County District Attorney's Office. At that time, Fontaine was a uniformed court officer of the same state court in which petitioner was on trial, but was not involved in the ongoing proceedings against the petitioner. Fontaine knew that Smith had an interest in law enforcement; he also knew that Smith was a juror in the Phillips trial. During the jury selection process Smith had revealed that he was interested in law enforcement and had applied for a position with the federal Drug Enforcement Administration.

With Smith's consent, Fontaine began to inquire about employment opportunities with the New York County District Attorney's Office on Smith's behalf, as well as his own. He spoke to Michael Mulderrig, an investigator in the District Attorney's Office whom he knew, about applying for a position. Fontaine was told that he should apply for a position by submitting a letter and a resume to the District Attorney's Office by hand or by mail. The record of this matter, including the post-trial hearings held by Justice Birns at which the testimony of these persons was taken, is inconclusive as to whether Fontaine mentioned to Mulderrig either Smith's name or the fact that Smith was a juror in a pending criminal action.

Fontaine also spoke to a jury warden for the New York State Supreme Court, one Mario Piazza, to inquire if he knew where an employment application should be submitted. Piazza in turn spoke to an assistant district attor-

ney, one John Lang, and was told that employment applications should be sent to the District Attorney's Office. Piazza did not know the names of the prospective applicants at that time and did not, therefore, mention Smith's name. However, he later met Smith, while petitioner's trial was underway, at a lunch with Fontaine.

On or about October 22, 1974, Smith drafted a letter and resume pursuant to Fontaine's instructions.[2] He gave these to Fontaine in an unstamped envelope for delivery to the District Attorney's Office. Smith stated at the post-trial hearings before Justice Birns that he assumed that Fontaine had a personal contact in the District Attorney's Office and that Fontaine would personally hand-deliver the envelope to that person when Fontaine submitted his own application. (Hearing Transcript at pp. 71-72). He further stated that he did not expect that Fontaine would influence the evaluation of his application through any of Fontaine's contacts within the District Attorney's Office. He did later, however, seek the help of a former job supervisor, Wallace Reilly, *infra*, whose acquaintance with members of the District Attorney's Office, Smith hoped, would be beneficial. (Hearing Transcript at p. 73).

Fontaine thereafter personally delivered his own application to the District Attorney's Office. However, when he offered the envelope containing Smith's application, he was told that it should be addressed and mailed to Richard

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2. The letter itself did not indicate that Smith was a member of the Phillips' jury. It was addressed to District Attorney Richard Kuh, and dated October 23, 1974. It stated:

> "I understand that a Federal Funded investigation unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator.
> Attached is my resume. Letters of recommendation will be furnished upon request. Thank you for your consideration."

Kuh, the District Attorney. Fontaine subsequently stamped and mailed the envelope as directed.[3]

Several days later, Fontaine met with Smith and Piazza for lunch, at which time Piazza informed Fontaine about Smith's application having been submitted. That afternoon or the next day, Piazza called Fontaine and told him that an Assistant District Attorney by the name of Sudolnik was responsible for reviewing applications for employment in the Major Felony Program for which Smith had submitted an application and that Smith should call her. Fontaine apparently relayed this information to Smith. It appears that, at the time of his last telephone conversation with Fontaine, Piazza was not aware that Smith was a juror in an ongoing criminal proceeding in state court.

In late October or early November, 1974, after Smith's employment application had been submitted, Assistant District Attorney Holmes was approached by Fontaine and informed that a person serving as a juror in the Phillips case had applied for a position with the District Attorney's Office. He may also have been asked if he would do something about the application, to which request, Holmes contended at the post-trial hearings, he initially indicated that he would check and see if an application had been filed. However, Holmes further contended, when he realized that the applicant was a juror, he became alarmed and told Fontaine that he would not contact Smith and that the application would not be processed. Fontaine contends that Holmes stated that he did not think that it was improper for a juror to apply for a position with the District Attor-

3. The letter with resume was received by the District Attorney's Office on or about October 23, 1974 and was routinely referred to Assistant District Attorney Conboy. It was eventually submitted to Assistant District Attorney Sudolnik.

fense counsel or the trial court should be informed. The trial, at that time, had not yet concluded. They reasoned that since Smith had indicated during the voir dire that he was interested in a career in law enforcement as an investigator and had a pending application with the federal Drug Enforcement Administration, this incident was not surprising or unexpected. Therefore, they assumed, so long as they did not contact the juror and did not gain any knowledge about his background which was unknown to the defense, they were not obligated to bring this matter to the attention of the Court or defense counsel.

On November 20, 1974, the jury retired to deliberate. At that time, three alternates were available and could have been used as substitute jurors for Smith. (Trial Transcript at p. 6156). The next day, on November 21, 1974, the jury rendered its verdict convicting the petitioner. Neither the court nor defense counsel was yet aware that Smith had applied for employment with the District Attorney's Office or that various contacts had been made with members of that office by persons interested in promoting Smith's application.

At the time the jury rendered its verdict, Smith's employment application was still pending. He had not been invited to an interview nor had he been informed of the status of his application. Having been previously informed by Piazza through Fontaine that he should contact Assistant District Attorney Sudolnik about his application, Smith attempted to contact her by telephone the day after the jury's verdict was rendered. She was not available at the time he called, however, and did not return his call. He then called his former supervisor, Wallace Reilly, under whom he had worked in the past while employed as a guard at a department store. Reilly apparently knew several of

the assistant district attorneys, and Smith asked him to inquire on his behalf. Reilly called Sudolnik and told her that Smith had worked for him and had done a good job. The fact that Smith had been a juror in the Phillips' case was also mentioned. She replied that Smith would be interviewed as would a number of other applicants and that the final selection was to be made by the New York City Bureau of Personnel and not the District Attorney's Office.

On December 9, 1974, District Attorney Richard Kuh informed the court that Smith had applied for employment during the pendency of the trial and that the two assistants had been approached regarding the application. Petitioner's defense counsel moved to vacate the verdict of the jury on the grounds of jury misconduct and prosecutorial misconduct. Justice Birns then held post-trial hearings at which the testimony of numerous persons, including Smith, was taken to establish a record of the events which occurred. Smith testified that while serving as a juror he did not consider whether the verdict would affect his application either favorably or unfavorably and that he did not think that it was improper to apply for employment when he did or that it was necessary to inform the court of his application.

Upon conclusion of the hearings, Justice Birns held that petitioner had not been deprived of his right to a trial before an impartial jury or otherwise prejudiced. Petitioner was then sentenced. On appeal, petitioner's conviction was affirmed without opinion. *People v. Phillips*, 52 App. Div.2d 758, 384 N.Y.S.2d 715 (1st Dep't). Thereafter, the New York State Court of Appeals denied leave to appeal. *People v. Phillips*, 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Having exhausted all available state remedies, petitioner commenced this action for a writ of habeas corpus on April 5, 1979. *Johnson v. Metz,* 609 F.2d 1052 (2d Cir. 1979).

DISCUSSION

The Sixth Amendment to the U. S. Constitution provides that a defendant in a criminal prosecution has a right to a trial by an impartial jury. This federal constitutional right is binding not only upon the federal courts, but also upon the individual states through the due process clause of the Fourteenth Amendment. *Duncan v. State of Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The determinative issue here is petitioner's claim that he was denied his constitutional right to a trial before a panel of impartial jurors. The gravamen of his claim is the prejudice he contends he suffered as a result of a juror having applied for employment with the prosecuting attorney's office during the course of his trial, which application was still pending during the period of the jury's deliberations. The problems caused by this event were further exacerbated by the failure of the prosecuting attorneys to promptly notify the court and defense counsel of these circumstances before the conclusion of trial and before the jury began its deliberations. Indeed, this Sixth Amendment constitutional challenge of the criminal conviction might have been avoided by prompt notification to the trial court and defense counsel and timely substitutional of one of the three available alternate jurors for Juror Smith before the jury commenced its deliberations.

Test of Jury Bias

The issue of jury bias in a criminal trial involves mixed questions of law and fact, *Reynolds v. United States,* 98

U.S. 145, 156, 25 L.Ed. 244 (1878), for which there is no single determinative test. As stated in *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936):

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In reviewing such claims, the federal courts have distinguished between those actions which involve claims of actual jury bias and those involving implied bias. Actual bias may be said to exist where there is sufficient evidence of a juror's prejudiced state of mind. *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 996, 22 L.Ed.2d 124 (1969). Upon a showing by a defendant that a claim of actual bias is more than mere conjecture, the court will review the trial record for objective evidence of prejudice—or the lack thereof—such as explicit assertions of partiality or of impartiality by the suspected juror to determine the validity of such claim. *E. g., Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970).

Where there is insufficient evidence of actual juror bias, the court may nevertheless find that a juror occupies a status or is a party to a relationship which, as a matter of law, raises the presumption of partiality. This presumption is conclusive and may not be defeated by affirmations of neutrality by the juror. *United States v. Haynes, supra*, 398 F.2d at 984.

The common law, see Blackstone's *Commentaries on the Law of England*, Bracton on the *Laws and Customs of England*, and *United States v. Burr*, 25 Fed.Cas.P. 49, 50

(14,692g) (C.C.Va.1807), provides the foundation for the formulation of the test for implied jury bias which is presently followed by the federal courts, the "average man" test. *Dennis v. United States,* 339 U.S. 162, 176, 70 S.Ct. 519, 527, 94 L.Ed. 734 (1950) (Black, J., dissenting); *United States v. Haynes,* 398 F.2d at 985. As set forth in *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1926):

> "[E]very procedure which would offer a possible temptation to the *average man* . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." (Emphasis supplied).

Accordingly, in adjudging a claim of *implied* jury bias this Court must determine whether an average man in the position of the juror in controversy would be prejudiced. Whereas, in reviewing a claim of *actual* jury bias, the Court must determine whether the evidence produced supports the conclusion that the juror was in fact partial.

Actual Bias

The record of the post-trial hearings in state court indicates that Juror Smith was not a passive, indifferent applicant for employment. Indeed, his active interest in the position he sought is manifest from his request that Fontaine obtain information for him about the position, from his immediate drafting of a resume and cover letter pursuant to Fontaine's instructions, from his efforts to contact Assistant District Attorney Sudolnik about the job after the trial was concluded, and from the efforts of his former supervisor, Wallace Reilly, to contact the District Attor-

ney's Office at Smith's request. Moreover, since he had applied for the position of an investigator with the Major Felony Unit of the prosecutor's office while sitting as a juror in a criminal case involving a capital offense, it appears initially that petitioner's claim of actual jury bias is not mere unfounded speculation. However, a further review of the record indicates that there is insufficient evidence to support a finding that Smith was actually partial to the State's case because of his desire to obtain employment. At the post-trial hearings before Justice Birns, Smith testified, in substance, that he was not influenced by his pending employment application and that he did not attempt to influence the other members of the jury. Although efforts were made by Piazza and Fontaine to contact members of the District Attorney's Office to urge that Smith be employed, Smith apparently was unaware of these solicitations and had not requested that such efforts be undertaken on his behalf. Further, the personal inquiries which he made himself and the efforts of Reilly which were made at his request did not occur until after the jury had rendered its verdict. Justice Birns who had observed the demeanor of all of the witnesses, including Smith who testified at the post-trial hearing concerning this issue, and who had the opportunity to observe Smith throughout the trial, concluded that Smith's judgment was not influenced by these circumstances.

Therefore, since petitioner has had ample opportunity to adduce evidence of actual prejudice, the Court finds that the record of this matter does not support petitioner's claim that Juror Smith was *actually* partial to the prosecution's case because he was seeking to obtain employment.

Implied Bias

In determining whether *implied* jury bias existed, the Court is mindful that it should not "create a set of unreasonably constricting presumptions that jurors [are impliedly biased because of] certain occupational or special relationships which might bear directly or indirectly on the circumstances of a given case. . . ." *Mikus v. United States,* 433 F.2d 719, 724 (2d Cir. 1970). For example, it is clear that mere current governmental employment of a juror, unrelated to the circumstances of a criminal prosecution, is not sufficient to raise a conclusive presumption of jury bias. *United States v. Wood,* 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936); *Frazier v. United States,* 335 U.S. 497, 69 S.Ct. 201, 93 L.Ed. 187 (1948). Similarly, a former government employee is not barred from serving as a juror merely because of his prior employment. *Mikus v. United States, supra,* 433 F.2d at 724.

In determining that current or former government employees are not disqualified from serving as jurors as a matter of law, the Courts have reasoned that government employees have no different interest in a criminal matter than that of "any citizen who wishes to see crime properly punished." *United States v. Wood,* 299 U.S. at 149, 57 S.Ct. at 187. Nonetheless, it has been implied that exceptional circumstances may exist which would warrant a finding of inherent prejudice based on the employment affiliation of a juror. *Id.* at 150, 57 S.Ct. at 187; *Frazier v. United States,* 335 U.S. at 510, 69 S.Ct. at 208.

The reasoning of the Court in *Frazier* and *Wood* is consistent with the average man test set forth in *United States v. Burr, supra,* and *Tumey v. Ohio, supra. See Dennis v. United States,* 339 U.S. 162, 177, 70 S.Ct. 519, 527, 941 L.Ed.

734 (1950). Under this test, the average person employed by the government would not be held to be prejudiced against a defendant in a criminal prosecution, as a matter of law, because of that employment, absent exceptional circumstances.

But prospective employment of a juror by the prosecutor's office as an investigator is not the type of circumstance addressed in *Frazier* or *Wood* and is not, in the opinion of this Court, governed by their holdings. In those cases, the jurors were current government employees whose work was not related in any significant way to the matter being tried. Here, Smith was seeking employment in a clearly definable context which was closely related to the matter being tried; he sought employment as an investigator with the Major Felony Unit in the District Attorney's Office while sitting as a juror in a homicide case then being prosecuted by that very office. Under these circumstances, it is reasonable to conclude that the average person in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application. Moreover, it would not be unreasonable for such a juror to assume that the prosecutor's office had reviewed his application and, in the process of reviewing his background, had become aware that he was a juror in a significant criminal trial it was then prosecuting, although his employment application did not so state. The Court notes that here the District Attorney's Office was in fact aware that Smith, a juror, had applied for employment, although it learned of this for reasons other than through its investigation of job applicants. Under these circumstances, reason suggests that a person would indeed be likely to favor the prosecution's position—at least to some extent.

This Court does not find that a conclusive presumption of partiality in this instance is unreasonably constrictive. No significant class of prospective jurors is likely to be affected. Furthermore, extrajudicial communications between jurors and the office of the prosecuting attorney should not be countenanced. *See Mattox v. United States*, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892). Nor has counsel for the respondent contended that a finding of implied juror bias would constitute an unreasonable limitation.

The established principle of implied jury bias is founded in English common law and has been adopted by American courts. As Blackstone noted, a prospective juror should not serve when it is shown:

> "that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him." 3 Colley, *Blackstone Commentaries on the Laws of England* 363.

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 Thorne, *Bracton on the Laws and Customs of England* 405 (1968). Our courts have frequently affirmed this tenet. Chief Justice Marshall stated

in *United States v. Burr*, 25 Fed.Cas.P. 409, 50 (14,692g) (C.C.Va. 1807) that:

> "The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice."

Accordingly, the Court finds that Juror Smith was not qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors. The assistant district attorneys who prosecuted these serious criminal charges in state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could likely have been avoided by the substitution of another juror for Smith.

For these reasons, the petition for a writ of habeas corpus is hereby conditionally granted unless retrial of the petitioner commences within ninety days of the entry of this order.

So Ordered.

APPENDIX C

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civil 1782 (LWP)

WILLIAM R. PHILLIPS,

Petitioner,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

May 7, 1980

The above named petitioner having filed a petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. Secs. 2241 & 2254 and said petition having been submitted to the Honorable Lawrence Pierce, United States District Judge, and the Court thereafter on March 14, 1980, having handed down its decision conditionally granting the said petition, it is,

ORDERED, ADJUDGED AND DECREED: That the petition be and it is hereby conditionally granted unless retrial of the

petitioner comences within ninety days of the entry of the Court's order.

Dated: New York, N.Y.
May 7, 1980

RAYMOND F. BURGHARDT,
Clerk

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

THOMAS W. AGREER,
Deputy Clerk

APPENDIX D

Order of the District Court Staying the Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 1782

WILLIAM R. PHILLIPS,

Petitioner,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

Respondent seeks an order staying this Court's conditional grant of a writ of habeas corpus. See Opinion and Order dated March 13, 1980. It appearing that respondent's appeal from the Opinion and Order of this Court dated March 13, 1980 is scheduled to be heard by the United States Court of Appeal for the Second Circuit on June 16, 1980, eleven days from the date of this Order, it is hereby ordered that the Opinion and Order dated March 13, 1980 is modified to provide that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is hereby conditionally granted unless retrial of the petitioner commences within sixty days of the date of the determination of respondent's appeal.

SO ORDERED.

Dated: New York, New York
March 5, 1980 (date misstated).

LAWRENCE W. PIERCE,
U. S. D. J.

cutorial misconduct as to warrant the relief sought. Thus, this court is not now confronted with a challenge to the sufficiency of the evidence against the defendant. It is concerned, however, with a tangential attack designed to upset the jury's verdict.

For the reasons stated below, the motion, in all respects, is denied. The alleged misconduct does not meet the requirements of the CPL.

Prior to the court's charge on November 20 and following summations the previous day, upon information first disclosed by the prosecutors on November 18, a hearing was held, *in camera*, concerning Juror No. 6, Mr. Lawrence Bethel. On October 4, the trial prosecutors, Messrs. Jack Litman and Philip La Penta, had obtained unverified information that Mr. Bethel had been arrested on a narcotics charge, a misdemeanor. It was not immediately known, but subsequent inquiry established, that he had been arrested on February 1, 1974, arraigned in the Criminal Court on February 2, and that he had then undertaken to cooperate with the office of the Special Narcotics Prosecutor in seeking the conviction of the alleged seller of the said narcotics. The charge against Mr. Bethel had been ACD'd, i.e., adjourned in contemplation of dismissal because of his promise of cooperation (see CPL 170.55).

Mr. Litman explained that the information concerning Mr. Bethel had not been disclosed earlier because the information had not only to be verified but it was also necessary to obtain the stenographic record of Mr. Bethel's interrogation on the *voir dire* prior to the trial to determine whether the questions put to him then in any way related to this newly acquired information, and that there was considerable delay in obtaining such stenographic minutes.

At the hearing, Mr. Allen Alpert, an assistant to the Special Narcotics Prosecutor, testified that he was an observer at the Phillips' trial on October 4, and that he believed he recognized juror Bethel as a person in whom his office had an interest. Shortly thereafter, he gave the information concerning Mr. Bethel to Mr. Litman.

Mr. Bethel, summoned from the juryroom (and thereafter not permitted to return), testified that he had not disclosed his arrest upon *voir dire* because he believed the charges against him were no longer pending and were of no consequence. In fact, it appeared that no question put to Mr. Bethel at that time required him to provide any information concerning his arrest or its surrounding circumstances (*People v. Rosen*, 251 App. Div. 584). Mr. Bethel also testified that at no time did he disclose to any of his fellow jurors the fact of his arrest or his promise to cooperate with the authorities.

A defense motion for a mistrial was denied, and thereupon Mr. Litman, the defense counsel Mr. Rothblatt, and the defendant in person expressly consented to the discharge of Mr. Bethel, although defense counsel reserved the right to make further inquiry into the matter, stating he intended to call the police officer, Douglas Brussel, who had arrested Mr. Bethel, to explore the promise of cooperation by Mr. Bethel and whether such cooperation in any way "tainted" the jury. Mr. Bethel's place in the jury box was taken by Mr. Robert F. Thompson, the alternate, whose name "was first drawn and called" (CPL 270.35, subd. 1).

Following the declaration of the jury's verdict, defense counsel specifically requested a further hearing concerning Mr. Bethel. December 9 was set for that purpose. Police Officer Brussel and Mr. Bethel were to appear on that date.

In fact, Mr. Brussel on that occasion testified that he learned in June or July from Assistant District Attorney Alpert that Mr. Bethel would cooperate against the alleged seller, but he never saw Mr. Bethel after the arraignment in Criminal Court or spoke to him since that time.

This court is satisfied beyond a reasonable doubt (*Chapman v. California*, 386 U.S. 18, discussed *infra*, p. 632) that at no time did Mr. Bethel disclose to any of his fellow jurors the fact of his arrest or of his promise of cooperation. To no degree was the jury "tainted" by Mr. Bethel. There was no misconduct by Mr. Bethel. The substitution of the alternate for Mr. Bethel consented to by the defendant, prevented any prospective prejudice to the defendant. The belated disclosure concerning Mr. Bethel can be attributed in part to the delay in obtaining his *voir dire* minutes and perhaps to trial pressures on the prosecutors. However that may be, the delay itself in supplying this information, although protracted, in no manner constituted prosecutorial misconduct, as will be seen, under the provisions of the CPL (CPL 330.30, subd. 2).

At the commencement of the proceedings on December 9, District Attorney Richard Kuh, again *in camera*, in the presence of defendant and defense counsel and others, made the following statement: On December 4, he had learned for the first time that during the trial of Mr. Phillips a letter had been received by his office on October 23 from one John Dana Smith seeking employment as an investigator. It developed that Mr. Smith was Juror No. 3 at the Phillips' trial. The letter, addressed to District Attorney Kuh's office, read as follows: "I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply

for a position as an investigator." Attached to the letter was a résumé containing biographical information concerning Mr. Smith. District Attorney Kuh proceeded to outline the history of the letter from the time of its receipt until its disclosure in court.

Defense counsel requested and was granted an immediate hearing concerning the letter and the failure of the trial prosecutors to disclose its existence during the trial. A hearing was held in open court (CPL 330.40, subd. 2, par [f]). Decision was reserved. It is noted that the law places upon the defendant "the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40, subd. 2, par [g]).

Facts

The testimony elicited at the hearing revealed the following unprecedented chain of events:

After being selected and sworn as a juror on September 23, Mr. Smith lunched with Criminal Court Officer Rudolph Fontaine, who had attended the John Jay College of Criminal Justice with Mr. Smith's wife. They discussed jobs in law enforcement. Mr. Fontaine told Mr. Smith of opportunities for persons with investigative backgrounds in the District Attorney's office. Mr. Smith evinced interest.

Mr. Fontaine then inquired of Investigator Mulderig of the District Attorney's Office, whom he knew, as to the procedure for filing applications for investigators' positions for himself and a friend. Mr. Johanssen, Mr. Mulderig's superior, verified the procedure. At no time did Mr. Fontaine mention Mr. Smith or his status as a juror. However, he did relate the information obtained to Mr. Smith. Mr. Smith's letter was mailed on October 22 and Mr. Fontaine submitted his own letter of application.

Mr. Smith's letter found its way to the desk of Assistant District Attorney Conboy, an administrative assistant, who, upon returning from vacation, referred it on or about November 9 to Miss Joan Sudolnik, an assistant in charge of the major felony program in the District Attorney's Office. She was seeking to employ investigators. In routine fashion she turned the letter over to her subordinate Mr. Lang, who noted on a memo that an appointment should be made with the applicant Mr. Smith. Up to that point no one in the District Attorney's Office knew or had reason to know that the applicant was a juror in a pending criminal trial. Supreme Court Officer Mario Piazza saw Mr. Smith and Mr. Fontaine at a luncheonette during the trial and voluntarily undertook to learn the name of the person in charge of hiring investigators and was told by Mr. Lang on a subsequent date that it was Miss Sudolnik. Mr. Fontaine sought to learn from Assistant District Attorney Holmes, whom he knew, the progress of Smith's letter of application and his own. In conversation he told Mr. Holmes that Mr. Smith was a juror in the Phillips case and raised the question, for the first time, whether such an application was proper. Mr. Holmes thought it sufficiently questionable to immediately inform his supervisor Mr. Lankler of the pending application and, in addition, promptly told Miss Sudolnik what he had learned. This occurred November 13.

Upon ascertaining that indeed there was an application from Mr. Smith and that Mr. Smith was a juror in the Phillips case, Miss Sudolnik immediately attempted to communicate with Mr. Litman, but could not reach him until the following day, November 14. Incredulously, Mr. Litman heard the information about Mr. Smith and also was told that no action was taken upon the application. Mr. La

Penta was present. Mr. Litman directed Miss Sudolnik to make no response at all to Mr. Smith's application, with which direction she complied. On Friday night, November 15, Mr. Holmes met Mr. La Penta in a restaurant and began to tell him of the Smith letter of application. Mr. La Penta did not want to hear any mention of it at that time and place.

When Mr. La Penta and Mr. Litman discussed this extraordinary development, they concluded that all that was required of them in the circumstances of the trial was to permit no contact to develop with this juror concerning the letter of application. That posture continued until after the jury's verdict was returned. It was developed that neither Mr. Litman nor Mr. La Penta sought advice from any superior or colleague with respect to Mr. Smith's letter. It is obvious, however, that Mr. Smith's presence on the jury was now known to many persons within and without the District Attorney's Office.

On December 4, following an unsuccessful habeas corpus proceeding initiated by defendant in the United States District Court, Southern District of New York, Mr. La Penta told Mr. John Keenan, Chief Assistant District Attorney, of Mr. Smith's letter of application. Mr. Keenan promptly investigated all the circumstances surrounding this application and made the results known to District Attorney Kuh without delay. Mr. Kuh promptly and properly disclosed the facts as he knew them concerning the letter of application and the result of Mr. Keenan's investigation to the defense and the court, as stated hereinabove.

In evaluating the testimony, this court finds that despite the probing and exhaustive examination of each and every witness at the hearing, there is no evidence which to any

degree points to a conclusion that any member of the District Attorney's staff, particularly Mr. Litman, Mr. La Penta, or any court officer, had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage over the defendant.

We turn, first, to the defense claim that Juror No. 3 was guilty of such improper conduct that the jury's verdict should be set aside. Specifically, it is claimed that Mr. Smith's desire to obtain employment in the District Attorney's office during the trial meant that under no circumstances would his verdict be other than guilty, because his success in obtaining such employment depended upon the return of a guilty verdict, and thus the defendant was denied his constitutional right to a fair trial.

Of course, no such conclusion is warranted from a mere reading of the letter.

Whether such a conclusion is warranted at all requires an examination of all the facts and circumstances disclosed at this hearing.

A review of the *voir dire* examination of Mr. Smith is helpful in assessing this claim. On his *voir dire* examination Mr. Smith made the following declarations: 1. that he was a store detective employed by Bloomingdale's for one year, from 1972 to 1973; 2. that his wife studied criminology at the John Jay College of Criminal Justice; 3. that he, Mr. Smith, following his expected graduation from the Columbia University School of General Studies, in October, planned to obtain employment in Federal Drug Enforcement overseas, in cooperation with local [foreign] authorities (and had already applied for such employment); 4. that he had, as store detective, made a number of arrests

and on many occasions had cooperated with the New York County District Attorney's Office; 5. that his wife had been the victim of a crime, that she had been stabbed, sustaining serious injuries, and that her assailant had been prosecuted by the New York County District Attorney's Office.

The continuing interest of the juror in law enforcement was acknowledged by defense counsel and he gave it his attention in the following questions put to Mr. Smith:

> "Q. Mr. Smith, I'm just a little curious here, I'm going to use the term that you are in a peculiar situation on this case. You've sort of been on the side of the law and law enforcement, making arrests for Bloomingdale's and now you are about to be appointed with a law enforcement agency with the Federal Government. Obviously in this case Bill Phillips is being accused and being prosecuted by the District Attorney's Office, and members of the Police Department in the City of New York, who are a central part of law enforcement—and I'm sure you are aware from your background of what you know—that Bill Phillips sits here in this case just like in every case; and our system of law says that he's presumed to be innocent. Now, do you feel that in this particular case, in spite of your experience, that the term presumption of innocence, as applies in this case, is not just theoretical, but the real meaningful law? Will you be able to keep that in mind?
>
> "A. I will do that, and Mr. Rothblatt, let me say that the reason, as I mentioned before, my ex-boss steered me to the Federal Drug Enforcement Agency for legal experience. At this time, I wouldn't be able to go to law school. In the near future, after serving with the Drug Enforcement Agency, I could go to law school. At this time, I've just had enough college atmosphere.

"Q. You want a little sabbatical?

"A. Ultimately, that is what my plans would be.

"Q. In other words, law enforcement is an intermediate step?

"A. It's all part of the same package, but it's in the legal and justice system."

It is also noted that the juror declared to the trial prosecutor that he would be "a fair and impartial juror in the case", and to Mr. Rothblatt he stated that if he had a reasonable doubt of the defendant's guilt he would have no hesitancy in returning a verdict of not guilty.

Despite his predilection for law enforcement in connection with his personal ambitions, Mr. Smith was accepted by the defense without challenge for cause. He was thereupon duly sworn as a juror in the case.

At the post-trial hearing conducted by this court, Mr. Smith testified that he learned of a job opportunity in law enforcement from an acquaintance, Criminal Court Officer Fontaine, whose acquaintance he renewed after assuming his role as a juror. He testified he never discussed the Phillips' case with Fontaine. When he learned from Mr. Fontaine the procedure in which an application could be forwarded to the District Attorney's Office, he gave his letter and résumé to Mr. Fontaine, who mailed it. He admitted that this act was imprudent, but asserted that his verdict in no way was conditioned upon the hope of employment by the District Attorney. He testified, "I am willing to take a rap for naivete." He stated to Mr. Rothblatt, "I swore on oath to listen to the evidence and to render a verdict on that evidence. I did so." Further, "To imply that I worked the jury's mind is repugnant to me and to the other jurors." To a question whether the hope of employment

would have in any way affected his verdict, he said, "That didn't enter my mind; I didn't think about it that way." Mr. Smith made no inquiry as to the progress of his letter of application until after the verdict, when for the first time he called Miss Sudolnik. She told him that she would look into the matter but never again communicated with him.

Mr. Rothblatt also inquired as to a conversation post verdict between Mr. Smith and his former supervisor at Bloomingdale's. Mr. Smith's testimony with respect to this was as follows: "A. He [Reilly] said, 'Did you really think the guy was guilty?' and I said yes, he was guilty as hell. He [Reilly] said, 'Was there a long deliberation?' I said, 'No it wasn't a very long deliberation.' That was the extent of it." Mr. Smith also discussed the progress of his application with Mr. Reilly, who had originally suggested to Mr. Smith that he seek a job with law enforcement (see *voir dire* of Juror Smith).

The defense has failed to establish that Mr. Smith's letter of application in any way reflected a prejudice, hostility, or premature determination as to the defendant's guilt (*United States v. Brown*, 79 F.2d 321). In no way did the letter reflect a state of mind on the part of this juror other than that acknowledged by the defense when it accepted the juror. As stated, Mr. Smith's predilection for law enforcement was well known to the defense and hence may not be used belatedly as a basis for challenge post-trial (*People v. Mack*, 35 App. Div. 114; *People v. Smith*, 169 N.Y.S. 837; see, also, *People v. Cosmos*, 205 N.Y. 91,103).

From all the evidence adduced, this court finds that it was Mr. Smith's faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney, and

ignore the possible construction which might be placed upon such action. As will be seen, the act of sending the letter did not constitute improper conduct within the meaning of CPL 330.30 (subd. 2).

We now turn to the additional defense claim that the trial prosecutors were guilty of improper conduct so as to deny the defendant a fair trial.

Specifically, it is asserted that their failure to inform defense counsel and the court of Mr. Smith's letter of application interfered with a substantial right of the defendant, i.e., a right to a fair and impartial jury and, in addition, if there had been such disclosure, the defendant then had a right under such circumstances to challenge Mr. Smith and have him removed from the jury before deliberations began (CPL 270.35, subd. 2).

As stated earlier, the letter of application was called to the attention of Mr. La Penta on November 14. The dilemma which then concerned the prosecutors was summarized in Mr. La Penta's testimony when he recalled saying to Mr. Litman, "What the hell do you do in a situation like this?"

After reflection, the prosecutors concluded that Mr. Smith's expressed desire in the letter to obtain employment in a Federally funded program in the District Attorney's Office was in no way inconsistent with the ambitions he unmistakably declared in the *voir dire*. They concluded that under these circumstances Mr. Smith had not engaged in any act of misconduct as to require them to bring knowledge of his letter to the attention of the court or defense counsel; that their prosecutorial responsibility would be met if the District Attorney's Office deliberately and assiduously avoided any further communication with Mr. Smith with respect to the letter of application.

They also reasoned that because there had been no dialogue between Juror Smith and the District Attorney's Office, as there had been between Juror Bethel and the office of the Special Narcotics Prosecutor, the absence of bilateral communication justified nondisclosure.

The Law

Juror Misconduct

CPL 330.30, as far as applicable to this case, provides: Motion to set aside verdict, grounds for.

"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: * * *

"2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict."

Under this section it appears that within certain time requirements (which have been met in this case) a verdict may be set aside on motion of the defendant *only* when there was improper conduct on the part of a juror which may have affected a substantial right of the defendant, or *only* when there has been improper conduct by another person in relation to a jury which may have affected a substantial right of the defendant, and such conduct was not known to the defendant prior to the jury's verdict. This section of the CPL is derived from subdivisions 2, 3, and 4 of section 465 of our former Code of Criminal Procedure

(see Denzer, Practice Commentaries, McKinney's Cons Laws of N.Y. Book 11A, p. 13).

Subdivisions 2, 3 and 4 of section 465 of our former Code of Criminal Procedure read as follows: "The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application in the following cases * * * 2. When the jury has received any evidence out of court * * * 3. When the jury * * * have been guilty of any misconduct by which a fair and due consideration of the case has been prevented; 4. When the verdict has been decided * * * by any means other than a fair expression of opinion on the part of all the jurors."

It would appear our former Code of Criminal Procedure empowered the court to grant a new trial when the jury was "guilty of any misconduct," but only where the defendant's "substantial rights have been prejudiced" and only where such misconduct "prevented" a "fair and due consideration of the case" (*People v. Cocco*, 305 N.Y. 282, 287, dissenting opn., FULD, J.).

Upon comparison, the thrust of both sections appears to be similar; that is, upon defendant's motion a jury's verdict may be vitiated where a defendant's substantial rights have been adversely affected by juror misconduct which would prevent a fair and due consideration of the case.

To interpret properly the current provisions of the CPL which permit a jury's verdict to be set aside, it will be necessary then to consider cases which were decided in similar instances under our former Code of Criminal Procedure. But first it will prove helpful to note the observations of recognized commentators on the subject of criminal law.

It is not every act of misconduct by a jury which will

his colleagues that the defendant on trial for robbery resembled members of a family he formerly knew with a reputation for being "tough", this statement was held not to have prejudiced the defendant so as to warrant a new trial (*People v. Thompson*, 198 N.Y. 396). Where a juror read from a copy of the Penal Law and the Code of Criminal Procedure and exhibited those volumes to the jury during deliberations, and where, in another case, a jury obtained a copy of the revised statutes while deliberating on a verdict, it was held in each case that the irregularity did not vitiate the verdict unless it could be shown that the defendant was prejudiced thereby (*People v. Priori*, 164 N.Y. 459; *People v. Draper*, 28 Hun 1). "[A]n irregularity or indiscretion of a jury is not of itself sufficient to warrant a new trial. More must be shown * * * The irregularity or indiscretion must be of such a nature as prevented fair and due consideration of the case" (*People v. Catalanotte, supra*, p. 353).

On the other hand, in a case where a defendant, a foreigner, was tried for murder and testified in his own behalf, and where it was established, without dispute, that a juror stated he would not believe a person of such nationality under oath, this continuing prejudice was held to deny defendant a fair trial. The verdict of guilty was vacated as a nullity (*People v. Leonti*, 262 N.Y. 256). The fact that a juror had a racial prejudice against the accused was held to deprive the defendant of a fair trial (*People v. Whitmore*, 45 Misc. 2d 506, revd. on other grounds 27 A.D.2d 939). Where jurors made unauthorized visits to the scene of alleged crimes, such action constituted the jurors witnesses against the respective defendants, thus depriving the particular defendant of Sixth Amendment rights, i.e., the right

to be confronted by such witnesses (*People v. De Lucia,* 20 N.Y.2d 275; *People v. Crimmins,* 26 N.Y.2d 319; see, also, *Parker v. Gladden,* 385 U.S. 363). Where a juror concealed a personal bias against the defendant, the defendant's right to a fair trial by an impartial jury was adversely affected (*People v. Harding,* 44 A.D.2d 800). In recognition of the fundamental rights to which a defendant is entitled in the administration of criminal law, it has been emphasized "a defendant has a right to a trial by a fair and impartial jury" (*People v. DeLucia, supra,* p. 278).

Thus, in determining whether alleged misconduct by a juror should warrant a new trial, it must be demonstrated that the fundamental right to a fair and impartial assessment of the facts were frustrated. This is always a crucial issue where juror misconduct is asserted.

Federal Jurists have considered similar problems. A reference to two cases in the Southern District will suffice. In *United States v. Brown* (79 F.2d 321, *supra*), during the pendency of a trial, a juror obtaining a haircut was asked by his barber how the trial was going and whether the defendant would be convicted. He answered, "I think so." This indiscretion was held not to show, as claimed, "a premature conclusion by the juror" as to the defendant's guilt so as to deprive the defendant of a fair trial. "It * * * was not an expression of a separate opinion to which a juror might feel himself committed; it was merely a forecast of the verdict, which could hardly be more than a provisional guess." (See opn., LEARNED HAND, J., p. 324.)

The case of *People ex rel. Moore v. Fay* (238 F. Supp. 1005, 1007) is most instructive on the issues before this court. Following a verdict in a State court convicting the defendant Moore of manslaughter, it was disclosed that

during the trial a juror, in violation of instructions not to discuss the case with others, communicated with his own attorney as to the propriety of a question asked by counsel during the trial. Judge EDWARD WEINFELD of the United States District Court, in denying habeas corpus relief sought by the defendant, observed (p. 1007): "There can be no doubt that the juror's communication with the third party violated the Court's expressed instruction, in consequence of which the juror's name was stricken from the jury list. However, not every violation by a juror of the Court's instructions with respect to third party communications, nor every irregularity in a juror's conduct, automatically compels the declaration of a mistrial, the replacement of a juror, or the vacatur of a judgment of conviction. The dereliction must be such that it may be said to deprive the parties of the continued objective and disinterested judgment of the juror, thereby foreclosing a fundamentally fair trial. This is not a case where a third party communicates with a juror with overtones of bribery, coercion, tampering, shadowing or other conduct which carries with it a presumption of prejudice. Here, the juror, seemingly in doubt as to the prosecution's action and the Court's ruling, himself initiated the communication. In and of itself, the incident did not suggest any prejudicial attitude toward the defendants." Cases have been cited by the defendant which spell out a dialogue or bilateral communication between a juror and third parties where the respective court believed the matter to be of such moment as to set a verdict aside (*Tableporter v. Urist*, 157 Misc. 347; *Pekar v. United States*, 315 F.2d 319).

On the other hand, in a prosecution for passing a fictitious check, a casual conversation between a trial prosecutor

and a juror in a courtroom corridor, in plain view of bystanders, was held not to be such misconduct as to require the setting aside of the jury's verdict (*People v. Newell*, 192 Cal. 659).

In the case at bar no dialogue or bilateral communication between Juror Smith and representatives of the District Attorney's office has been established. The direction of Mr. Litman to Miss Sudolnik not to respond to the letter effectively encapsulated the communication. There was nothing in the letter which in any way was inconsistent with the ambitions expressed by the juror in the *voir dire*, which were acknowledged and accepted by the defense. Mr. Smith's letter was indeed an indiscretion but, in the light of his *voir dire*, in no way reflected a premature conclusion as to the defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence.

Prosecutorial Misconduct

We turn now to the issue of prosecutorial misconduct as claimed by the defense. The decision not to disclose the job application of Juror Smith was made by Mr. Litman, with six trial weeks behind him and summation a week away, with knowledge of the looming problem of Juror Bethel and at a time when the defendant had just completed his fourth day of cross-examination by Mr. Litman.

Mr. Litman believed that he met his professional responsibility by ignoring Mr. Smith's letter and advising his associates in the District Attorney's Office to do the same.

The standards of the American Bar Association provide: "If counsel suspects * * * juror misconduct he should, of course, report it to the court" (American Bar Association,

Standards Relating to the Prosecution Function and the Defense Function, commentary to § 5.3, p. 116).

The standards of the New York State Bar Association provide: "Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards * * * a juror * * * should make a prompt report to the court regarding such conduct" (Code of Professional Responsibility, EC 7-32).

Mr. Litman and Mr. La Penta, in their testimony, explained that they did not view Mr. Smith's letter as "juror misconduct," and it appears that they were correct. But undoubtedly, it was questionable conduct, and, under the circumstances, this court and defense counsel should have been made aware of it during the trial, as they were made aware of it on December 9.

It was a serious error in judgment, although there may be room for a contrary opinion (*People v. Cocco*, 305 N.Y. 282, *supra*, [see dissenting opn., Fuld, J., p. 287]; see, also, *United States v. Kyle*, 469, F.2d 547). The Assistant District Attorneys were quasi-judicial officers holding a special status in the administration of criminal law. As prosecutors, they were "not [to be] the judge of what is unduly prejudicial to the government or the defense" (*United States v. Kyle, supra*, p. 552 dissenting opn. of Bazelon, Ch. J.). Certainly prosecutors are to be held to a higher standard than that required of ordinary laymen (cf. *Meinhard v Salmon*, 249 N.Y. 458). Had they not permitted the pressures of the case to becloud their professional vision, there would be no need for this hearing, the occurrence of which has proved inevitable.

Moreover, the juror could have been excused by consent, or an application for a discharge of a juror could have been

made by defense counsel (see *People ex rel. Moore v. Fay*, 238 F. Supp. 1005, *supra*). Whether at the time this court would have ruled to excuse the juror on grounds specified in our CPL (§ CPL 270.35) is now beside the point, but will be discussed hereinafter. Alternates were available to replace up to four jurors, who for one reason or another might be unable to sit until the conclusion of the trial.

However we are not now concerned with the resolution of a question of professional ethics. We are considering a definite narrow legal issue, i.e., whether the failure to disclose Mr. Smith's letter of application constituted "improper conduct by another person in relation to a juror," and if so, may it "have affected a substantial right of the defendant" (CPL 330.30, subd. 2).

From a mere reading of the statute one may readily conclude that the phrase "improper conduct by another person in relation to a juror" was designed to meet the problem of "jury tampering"; that is, affirmative action by a third person directed toward a juror with intent to affect a jury's verdict (for examples of such conduct see *People v. Cocco*, 305 N.Y. 282, *supra; People v. Sher*, 24 N.Y.2d 454).

In the *Cocco* case, a discharged alternate in a public restaurant, during the time the sequestered jury was about to dine, informed a juror that he heard the defendant on trial for a felony ran "a sporting house." Despite the juror's disclaimer that her judgment was in no way impaired as a result of this conversation, the verdict of guilty was set aside, the Court of Appeals concluding that the defendant's right to a fair trial was adversely affected.

In another case, during the taking of testimony in a trial of a defendant charged with murder, several jurors received anonymous communications by telephone disparaging the

defendant. The trial court, after determining that each recipient of a call could render a fair and impartial verdict on the evidence, refused to set aside a verdict convicting the defendant. The judgment of conviction was affirmed (*People v. Sher, supra*). It is not necessary to analyze the rationale distinguishing the contrary result in each case. The point is that in each case it was affirmative activity by a third party in relation to a juror which brought into question whether the sanction of law should be imposed.

It is claimed by the defense that the failure of the trial prosecutor to disclose Mr. Smith's letter amounted to "improper conduct by another person in relation to a juror." Such omission to disclose cannot be equated with jury tampering. The challenged behavior of the prosecutors focuses upon an omission to act in relation to a juror rather than some positive deliberate step by the prosecutors designed to influence the jury's verdict. Accordingly, this court cannot hold in this instance that there was prosecutorial misconduct within the meaning of the CPL [CPL 330.30, subd. 2].

The defense also contends that the failure to disclose Mr. Smith's letter during trial deprived it of the opportunity to challenge the juror during trial.

The CPL permits, under certain circumstances, the discharge of a juror during trial where the juror's continued presence on the jury is attacked (CPL 270.35, subd. 2). If it is shown "that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 280.10, the court may," if an alternate juror is present, "discharge such * * * juror" and replace him with the appropriate alternate.

It is not *any* misconduct of a juror which may require a change in the jury's composition, but "misconduct of a substantial nature" which would not require the declaration of a mistrial under conditions specified in another section of the CPL (CPL 280.10).

Under CPL 280.10 (subd. 1), a defendant may move for a mistrial prior to the jury's deliberation only when "there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial."

To warrant a mistrial on a defendant's motion, the conduct complained of must "so clearly [deprive the defendant] of a fair trial that it would require a reversal on appeal of a prospective judgment of conviction" (see Denzer, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 11A, CPL 280.10, p. 521, citing *People v. Byrne,* 17 N.Y.2d 209; *People ex rel. Costello v. La Valle,* 13 A.D.2d 601; *People v. Montlake,* 184 App. Div. 578).

While the degree of misconduct required to merely excuse a juror under attack during trial (CPL 270.35, subd. [2]) appears to be less than that which would warrant mistrial sought by a defendant (CPL 280.10, subd. 1), nevertheless to remove a juror during trial, his misconduct must be found to be substantial. It necessarily follows that such misconduct must be of such import as to affect adversely the ability of the juror to sit fairly and impartially assess the issues on trial.

The conduct of Mr. Smith in sending his letter of October 22, as shown hereinbefore, in no way deprived the defendant of a fair trial so as to warrant the declaration of a mistrial on defendant's motion under CPL 280.10. Nor did that act amount to misconduct of a substantial nature which

would, in the light of his answers during his *voir dire* examination, require him, *ipso facto*, to be excused under CPL 270.35 (subd [2]). To no degree did the letter have such import in relation to the issues at the trial so as to demonstrate Mr. Smith's hostility or prejudice to the defendant or a premature determination of the defendant's guilt (*United States ex rel. Moore v. Fay*, 238 F. Supp. 1005, *supra*; *United States v. Brown*, 79 F.2d 321, *supra*). It was, at most, an irregularity. Had the receipt of the letter been disclosed at the trial, in the absence of a consent by the District Attorney to excuse Mr. Smith as a juror, defendant's motion challenging the right of Mr. Smith to continue to sit as a juror would necessarily have to be denied as a matter of law.

Conclusion

Each such case must be considered in the light of its own facts and circumstances (*United States v. Betner*, 489 F.2d 116). "[W]hen jury misconduct is alleged in a defendant's motion for a new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for a new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review." (*United States v. McKinney*, 429 F.2d 1019, 1026).

Only for the most compelling reasons should a jury verdict be set aside (*McDonald v. Pless*, 238 U.S. 264; *Tanner v. Stimm*, 66 Misc. 2d 1030; *People v. Maynard*, 80 Misc. 2d 279).

It would be manifestly improper to permit a tangential post-trial attack of insufficient strength to overcome the verdict in this case, which rests upon so firm a factual foundation.

More particularly, it would be manifestly improper to invalidate the verdict here merely because of unprecedented imprudence on the part of a juror or unique misjudgment of the trial prosecutors as to the requirement of professional ethics, where no prejudice to the defendant's substantial rights has been shown and substitution for such juror during trial most likely would not have altered the result (cf. *United States v. Keogh*, 391 F.2d 138, 148). As has been stated in another connection, "A defendant is entitled to a fair trial but not a perfect one" (*Lutwak v. United States*, 344 U.S. 604, 619).

Aware that the present application for a new trial under CPL 330.30, like its predecessor section 465 of the Code of Criminal Procedure, is addressed to the sound judicial discretion of the Trial Judge, this court is of the opinion, from the testimony adduced at this hearing, that the defendant's substantial rights were not prejudiced.

Although our CPL specifies that the defendant has the "burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40, subd. 2, par [g]), it is noted that the defendant's claim that he was denied his right to a fair trial is one of constitutional dimension (U.S. Const., 6th Amdt.; N.Y. Const. art. I, § 6). Accordingly, this court holds, as it is required to do under such circumstances, that it is satisfied beyond a reasonable doubt that the "irregularities" established were harmless and did not contribute to the verdict in this case (*Chapman v. California*, 386 U.S. 18, *supra*, citing *Fahy v. Connecticut*, 375 U.S. 85; *People v. Catalanotte*, 67 Misc. 2d 351, *supra*).

The defendant's motion is in all respects denied.

APPENDIX F

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and eighty.

Present:

HON. JAMES L. OAKES
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges
HON. EUGENE H. NICKERSON
District Judge

80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee-cross-appellant

v.

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent-Appellant-cross-appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the respondent-appellant.

A. Daniel Fusaro
Clerk

By: /s/ Rolanne Henry
Rolanne Henry
Deputy Clerk

APPENDIX G

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of December, one thousand nine hundred and eighty.

No. 80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee,

v.

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent-appellant, Harold J. Smith,

Upon consideration by the panel that heard the appeal, it is

80-1082

Supreme Court, U.S.
FILED
JAN 17 1981
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. .....

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1980

No. .....

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Respondent, William R. Phillips, by his undersigned counsel, pursuant to Rule 22 of the Rules of this Court, respectfully opposes the Petition for a Writ of Certiorari submitted by the New York County District Attorney on behalf of petitioner, Harold J. Smith, Superintendent, Attica Correctional Facility, to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Counter-Statement

Although respondent has no serious disagreement with petitioner's preliminary material, there are several significant omitted facts which, in counsel's opinion, may merit consideration by this Honorable Court. They are as follows:

1. John J. Justy, the detective who allegedly saw respondent during his 1971 televised Knapp Commission testimony and believed that he fit the 1968 composite sketch of the Smith-Stango murderer, was the best friend of a New York City police officer, who had committed suicide prior thereto under the mistaken belief that he had been implicated before the Commission by respondent.

2. Respondent's undercover work for the Knapp Commission had resulted in six federal and six New York County indictments naming a total of 17 New York City police officers and 14 other persons, most of whom were organized crime members. According to the affidavit of Michael F. Armstrong, the Knapp Commission's chief counsel, "[M]any more indictments were anticipated as a result of Mr. Phillips' work, but his own indictment on March 20, 1972, on charges of murder and attempted murder, aborted most of these efforts."

3. Some of the so-called new evidence utilized against respondent at his second trial consisted of a tape recording of his statement to Mr. Armstrong, for which he had, again according to Mr. Armstrong's affidavit, received "full and complete transactional immunity . . ." *

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* In conditionally granting respondent's Petition for a Writ of Habeas Corpus, the District Court did not address itself to this ground and that set forth in paragraph (g) *infra*, both of which were raised by respondent, "since this Court finds, with

[Footnote continued on following page]

4(a). The application of Juror John Dana Smith for a position with the New York County District Attorney's office was initially hand-delivered and ultimately mailed thereto by a New York County Supreme Court officer, a friend of Mr. Smith, shortly after respondent's second trial began.

(b). During the said trial, another New York County Supreme Court officer obtained the name of the Assistant District Attorney responsible for reviewing Smith's application and relayed said information to the latter with a recommendation that he call said Assistant District Attorney.

(c). While respondent's trial was in progress, the New York County Supreme Court officers referred to in (a) and (b) above made inquiries, at Smith's request, to several Assistant Attorneys about the position for which he had applied.

(d). The two Assistant District Attorneys prosecuting respondent's case were notified about Juror Smith's application a week before the termination of respondent's second trial and decided not to inform the trial court or defense of that fact and one said prosecutor stated to another Assistant District Attorney that "I don't want to hear about that anymore."

(e). Juror Smith, who, during respondent's trial, had heard nothing from anyone in the District Attorney's office about his pending application, attempted to contact the Assistant District Attorney

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respect to his first contention, that the fundamental constitutional requirements of a trial before an impartial jury and of due process were denied to the petitioner upon the undisputed fact that a juror filed an application for a job in the prosecutor's office after being selected to serve on the trial jury in this case, which application was still pending at the time the jury rendered its verdict." Appendix to Petition (hereinafter "App.") at 14a-15a.

referred to in (b) above the day after the jury's verdict was rendered. When he failed to establish such contact, he asked a former employer with several contacts in the District Attorney's office to do so. The latter thereupon called the Assistant District Attorney in question and informed her, *inter alia*, that Smith had served on respondent's jury, a fact that she had learned during the trial.

(f). At a post-trial hearing ordered by the trial judge after the disclosure of Smith's employment application, the prosecution revealed for the first time that the juror had had drug and family problems in 1970 or 1971, had been a patient in a Connecticut mental hospital, and had had problems with the police in both New York City and Australia.

(g). Early in respondent's second trial, the Assistant District Attorneys in charge of the prosecution also learned that another sworn juror, one Lawrence Bethel, had been arrested on a narcotics charge prior to the commencement of the trial and had agreed to cooperate with an adjunct of the District Attorney's office in exchange for a dismissal of the said charges, but did not disclose said information until just prior to the beginning of the jury's deliberations. Following such disclosure and an *in camera* hearing, the parties consented to Mr. Bethel's discharge, and his replacement by the first of four available alternates.

Reasons for Denying the Writ

Petitioner claims that the decision of the court below "expands federal habeas corpus review of state convictions to permit federal courts to exercise supervisory power over the conduct of state prosecutors by nullifying convictions even though the challenged conduct did not affect the outcome of the trial." Petition at p. 10. He further

contends that said decision represents "a gross departure from [accepted constitutional principles and statutory requirements] because it directly conflicts with no fewer than three decisions of this Court—*Remmer* v. *United States*, 347 U.S. 227 (1954); *United States* v. *Agurs*, 427 U.S. 97 (1976); and *Donnelly* v. *De Christoforo*, 416 U.S. 637 (1974)—and directly contravenes the statutory requirements governing habeas corpus. 28 U.S.C. 2254." *Id.*

Respondent has no basic fault to find with the appropriateness, in the usual situation, of a post-verdict inquiry in any case where the impartiality of a juror is brought into question after the conclusion of a criminal trial. However, we are here confronted with a state of facts which are uniquely *sui generis*. We are not here concerned with the effect of outside influences purportedly exerted upon a trial juror as in *Remmer*, *supra*, but with the juror's own unilateral conduct in seeking employment, *after* being sworn, with the prosecutor's office, and in making persistent inquiry, often through others, as to the status of his application during the trial and immediately subsequent to verdict. It is highly doubtful whether such a set of extraordinary circumstances have ever occurred in any other American criminal trial and, indeed, the literature reveals no such instance.*

Accordingly, it is impossible, as Circuit Judge Oakes pointed out during oral argument below, to accept at face value the assurances of the juror in question that he was, in fact, impartial. Indeed, as Judge Oakes further remarked, it was highly improbable that such a juror, whose own serious misconduct was at issue, would ever admit to bias or prejudice when confronted with the

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* Even the trial judge characterized the conduct of Juror Smith as "unprecedented imprudence" and that of the prosecution as "unique misjudgment." App. at 57a.

indisputable evidence of his application for employment by the prosecutor. Under these circumstances, the juror's protestations of impartiality, no matter how vehement or sustained, simply cannot be accepted as proof beyond a reasonable doubt of his freedom from bias or prejudice. As the majority below put it:

> "Given the human propensity, often subconscious, for self-justification, as well as the 'psychological impact' of requiring an individual to state before others whether he was fair and impartial, *Irwin* v. *Dowd*, 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial.' Indeed, following a seven week trial, any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect." App. at 7a.

The best that can be said of this issue is, as the District Court observed, "that the record of this matter does not support [respondent's] claim that juror Smith was *actually* partial to the prosecution's case because he was seeking employment." App. at 25a. (emphasis in original).

Moreover, Juror Smith's partiality, assuming it, for the sake of argument, to be deep and pervasive, must, human nature being what it is, be regarded as being incapable of proof, unless he was willing to implicate himself, both criminally and civilly. This was not the case in *Remmer*, *supra* [FBI agent sent into jury room without defendant's knowledge or consent to investigate rumor that unnamed person had informed juror that he could profit by a verdict in favor of defendant]; or in *United States* v. *Johns*, 615 F.2d 672 (5th Cir. 1980) [alternate juror learned and advised foreman of the murder of an unidentified trial witness]; *United States*

v. *Gross*, 614 F.2d 365 (3d Cir. 1980), *cert. den.*, — U.S. —, 100 S. Ct. 3019 (1980) [some jurors' annoyance at a marshal's expressed romantic interest in one of their number]; or *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980) [post-trial revelation that one juror had complained to the prosecutor throughout the trial of harassment by "voices" and "vibrations"]. Here, Juror Smith instigated the employment application shortly after trial testimony began, evidenced a more than lively interest in its progress throughout the trial, and wasted no time in pursuing it vigorously as soon as the verdicts were rendered.

There are a multitude of appropriate and applicable legal theories which support the decision below. Whether it is grounded on the District Court's "implied bias" concept which was based, in part, on this Court's ruling in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the due process disclosure requirements of such cases as *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Agurs*, 427 U.S. 97 (1976), the "appearance of justice" standard, *Rose* v. *Mitchell*, 443 U.S. 545 (1979), or the so-called "objective prophylactic" rule referred to by both the District Court and the Court of Appeals, App. at 7a, 22a and 29a, it is clear that what the District Court referred to as an "inexcusable abridgement of the [respondent's] Sixth Amendment right" to a demonstrably fair and impartial jury entitles the latter, at the very least, to a new trial.

Finally, the court below very carefully restricted its decision to the unique fact pattern before it. As District Judge Nickerson, writing for the majority, put it:

> No doubt there will be cases in which the prosecution receives innocuous information regarding a juror. While the prudent prosecutor will no doubt err on the side of disclosure, we do not suggest that a new trial will be required in every case. *We merely hold that the prosecutor may not keep*

silent when he knows that a juror has applied to become his employee. App. at 10a (emphasis added).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.*

Respectfully submitted,

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Dated: New York, New York
January 16, 1981

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* In view of the fact that respondent filed his Petiiton for a Writ of Habeas Corpus with the District Court some 21 months ago, received his conditional grant of the Writ ten months ago, which said order was affirmed by the Court of Appeals more than three months ago and rehearing denied more than one month ago, it is respectfully requested that this Court decide the within Petition expeditiously as every passing day adds intolerably to his more than six years of unlawful incarceration.

No. 80-1082

Office-Supreme Court, U.S.
FILED
JAN 23 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

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HAROLD J. SMITH, Superintendent,
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REPLY AND SUPPLEMENTAL BRIEF FOR PETITIONER

Respondent seeks to persuade this Court to deny certiorari by arguing that the decision below was a correct application of general principles to a unique set of facts which calls for an extraordinary remedy. The very arguments respondent makes to justify the decision below demonstrate why certiorari should be granted. Moreover, this Court's January 13th decision in *United States* v. *Morrison* (49 U.S.L.W. 4087) further demonstrates that the decision below was incorrect and an inappropriate intrusion into the state criminal justice process.

Respondent concedes that under the *Remmer* line of cases, a post-trial hearing is the appropriate procedural device to determine the truth of allegations concerning juror bias. He tries to justify the decision below, which ignored *Remmer,* by pointing out that the *Remmer* line of cases requires a hearing in situations involving outside influences on a juror while the influence here was conduct of the juror himself in applying for a job. Notably, the majority opinion never drew such a distinction, probably because impartiality is equally difficult to assess whether the alleged influence derives from outside sources or the juror's own conduct.

Respondent nevertheless proposes that the majority meant to say that the source of the bias renders *Remmer* inapplicable. To make that argument, respondent relies on Judge Oakes' comments at oral argument. An opinion can hardly be interpreted in light of comments at oral argument which did not find their way into the opinion. In any event, those comments do not support respondent's position. Judge Oakes did not state that the source of the alleged juror bias made it impossible at a post-verdict hearing to determine whether the juror was actually biased. Rather, the substance of Judge Oakes' comments is that a juror's assurance of his impartiality should not be accepted at face value. Here, the state trial judge did not accept the assurances at face value. Instead, as federal courts do, he found impartiality beyond a reasonable doubt on the substance of the juror's testimony, the demeanor and credibility of the juror and the testimony of other witnesses. *See Ristaino* v. *Ross,* 424 U.S. 589, 595 (1976); *see also United States* v. *Panebianco,* 543 F.2d 447, 457 (2d Cir.

1976), *cert. denied*, 429 U.S. 1103 (1977); *United States* v. *Hockridge*, 573 F.2d 752, 756 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978).*

Given the fully supported finding of impartiality, undisputed by the courts below, respondent is clearly wrong in suggesting that the decision below turns on the unique fact that the juror applied for a job. It is plain, as seen by the majority's language quoted and emphasized by respondent on pages 7 and 8 of his brief, that the majority based its decision on the assistant district attorney's failure to disclose that application (*see* App. A to Petition at 10a). It seems fair to say that if the application had not been discovered by the trial prosecutors, until after the verdict, the majority would have held the *Remmer*-type hearing more than adequate. The hearing was ignored not because of any unique characteristic of the juror's conduct but because of the prosecutor's failure to disclose that conduct. As pointed out in pages 10-15 of the petition, whether reversal is the appropriate remedy for this breach of duty at the very least presents a substantial question.

Significantly, in regard to the question of remedy, on January 13, 1981, this Court decided *United States* v. *Morrison* (49 U.S.L.W. 4087) and held that an indictment should not be dismissed because of prosecutorial misconduct relating to the Sixth Amendment right to counsel unless there is a showing of prejudice. True, that case dealt with the dismissal of the indictment. The Court nonetheless emphasized that there was no prejudice and that

* The argument of respondent that the juror eagerly, quickly and without regard to the evidence voted to convict so that he could secure a job is not supported by the record and is contradictory to the trial judge's findings of fact which are fully supported by the record.

"the Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceeding against respondent Morrison much less the drastic relief granted by the Court of Appeals" (*id.* at 4089). This language makes clear that, absent prejudice, a violation in a federal prosecution of even the Sixth Amendment's guarantee of the effective assistance of counsel provides no justification for a new trial. Surely, no different rule should apply in habeas corpus review of a state prosecution where a petitioner alleges a violation of the Sixth Amendment guarantee of the right to an impartial jury.

According to the *Morrison* case, a "[remedy] should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (*id.* at 4088). The appropriate remedy in a juror-bias setting has been tailored by the *Remmer* case. That relief is a post-verdict hearing with reversal only upon a finding of partiality. By their failure to follow *Remmer* the majority below has declared a new constitutional principle and has unnecessarily infringed on the interest of the federal-state comity. That the court below, in finding prejudice irrelevant, did enunciate a new principle in conflict with the *Morrison* case is confirmed by a brief examination of respondent's laundry list of the "multitude of appropriate and applicable legal theories that support the decision below." Brief in Opposition at 7.

The first and last of the inappropriate and inapplicable multitude pointed to by respondent is the implied bias doctrine also called the "objective-prophylactic rule." The court below expressly said that it was not basing its deci-

sion on this rule and indicated that it was not the law. App. A to Petition at 7a. In support of his implied bias argument, respondent mentions *Tumey* v. *Ohio*, 272 U.S. 510 (1927). Notably, *Tumey* involved the implied, perhaps even the actual, bias of a judge whose salary was in part paid by fees and costs imposed after conviction. *See also Connally* v. *Georgia*, 429 U.S. 245, 247-49 (1977). Here there is nothing in the record which supports a finding that the juror believed he would receive such a direct pecuniary benefit if he voted for conviction. Indeed, the state trial judge found that the juror had no such belief, a finding which is fully supported by the record and which was not disputed by either the district court or the court below.

Moreover, *Tumey* recognizes that it is important that a trial judge appear impartial because the alleged bias of a judge is not explored in detail by an impartial arbiter, but the judge himself decides whether or not he should preside. There is no such exploration because a hearing with cross-examination would be particularly unseemly, time consuming and a waste of resources. On the other hand, the impartiality of a juror is reviewable by a neutral judge, who can objectively hear testimony, observe demeanor, and weigh the evidence of a juror's partiality or impartiality. Accordingly, the Constitution requires the exclusion only of jurors who are actually, not impliedly or apparently, biased. *See United States* v. *Wood*, 299 U.S. 123, 140-46 (1936); *Frazier* v. *United States*, 335 U.S. 497 (1948); *see also Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *Dennis* v. *United States*, 339 U.S. 162, 171-72 (1950); *Beck* v. *Washington*, 369 U.S. 541, 545 (1962).

Respondent's suggestion that the decision below could be supported by a rule of implied bias (even though the

majority expressly refused to so hold [App. A to Petition at 7a]) would make the decision conflict with not only the *Wood, Frazier, Irvin, Dennis* and *Beck* decisions, but also decisions of circuit courts, including the Second Circuit. *See, e.g., United States* v. *DeLeon,* 462 F.2d 170, 172 (5th Cir. 1972), *cert. denied,* 414 U.S. 853 (1973); *Mikus* v. *United States,* 433 F.2d 719, 724 (2d Cir. 1970). If this were the basis for the decision below, such a conflict alone would seem to call for a grant of certiorari.

To support the decision below, respondent also points to the due process disclosure requirement of the *Brady* and *Agurs* cases. However, those cases as demonstrated at page 12 of the petition require a showing of prejudice, a showing which cannot be made in this case. Respondent then turns to the "appearance of justice" language of *Rose* v. *Mitchell,* 443 U.S. 545, 555-56 (1979). However, that case specifically addresses the appearance of justice in the context of racial discrimination in grand jury selection and there is absolutely no racial issue in this case. Moreover, in a non-racial context, like this one, a rationale based upon the appearance of justice without a requirement of prejudice would be in direct conflict with the recently decided *Morrison* case.

In sum, there is no established legal theory which supports the court below, which has enunciated a new principle. Respondent seems to recognize that this is so for he continually suggests that the facts of the instant case are unique in the apparent hope that this Court will, as it generally does, refuse to grant certiorari to review such a case. But, this case does not turn on unique facts; it turns on a unique mistake of law with broad implications for future

cases. That mistake of law has led a bare two-to-one majority of a federal court to exercise in a state case a supervisory power uniquely belonging to the state courts, and which six state judges found injudicious to exercise. That mistake calls for review by this Court if we are to have a meaningful federal system.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 22, 1981

No. 80-1082

Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AND APPENDIX FOR PETITIONER

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Questions Presented

In a state criminal trial, the defense accepted as a juror a man who was then actively seeking employment as an investigator with federal law enforcement agencies. During trial, that juror, having heard about an investigator's position in the District Attorney's Office, wrote a letter applying for that position without mentioning his status as a juror. Although the trial prosecutor learned of the application during trial, it was not disclosed to defense counsel or the trial judge until after trial. Following disclosure and an extensive post-trial hearing, the state judge found beyond a reasonable doubt that the juror was not biased as the result of the pending application, and this finding was affirmed on appeal.

1. In reviewing a state conviction in a federal habeas corpus proceeding, may a federal court ignore the state courts' finding that the juror was not biased and hold that, even absent demonstrable prejudice, the prosecutor's failure to disclose the juror's letter was of itself a violation of due process which required a new trial?

   The United States Court of Appeals for the Second Circuit, in a 2-1 decision, answered this question in the affirmative.

2. Are the findings and conclusions by the state courts irrelevant because the juror's letter created a conclusive presumption of bias, which could not be rebutted?

   The United States Court of Appeals for the Second Circuit did not reach this question but the United States District Court for the Southern District of New York answered this question in the affirmative.

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Point—The prosecutor's failure to disclose that during trial a juror had applied for a job in the District Attorney's Office did not prejudice respondent's constitutional right to an impartial jury trial because the Constitution requires only that jurors be actually impartial and, as required by this Court, the state judge held a post-trial hearing and found beyond a reasonable doubt that the juror was not biased 22

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(2) The state judge's finding that the juror was not biased is presumed correct, and is fully supported by the record 34

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No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

The New York County District Attorney, on behalf of the State of New York, as counsel for Harold J. Smith, Superintendent of Attica Correctional Facility, appeals from a judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals, by a divided court (2-1), affirmed a judgment of the United States District Court for the Southern District of New York (PIERCE, J.), granting a writ of habeas corpus to respondent William R. Phillips.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the grant of habeas corpus (App. A, 1a-12a)[1] is reported at 632 F.2d 1019 (1980). The opinion of the United States District Court for the Southern District of New York granting the writ of habeas corpus (App. B, 13a-29a) is reported at 485 F. Supp. 1365 (1980). The opinion of the state trial judge denying the motion to set aside the conviction (App. E, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S.2d 906 (1975). The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of Chief Judge Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, 58a-59a). Rehearing was denied on December 8, 1980 (App. G, 60a-61a). The petition for a writ of certiorari was filed on January 1, 1981, and this Court granted the petition on February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the appendix to this brief.

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1. The parties have agreed that Appendices A through G to the petition for certiorari should constitute the Joint Appendix, and on April 20, 1981, the Court granted the State's motion to dispense with printing the appendix. References, therefore, are to the appendices to the petition for certiorari.

Statement of the Case

Introduction

On Christmas Eve, 1968, on Manhattan's fashionable East Side, William Phillips, a corrupt New York City police officer, entered a house of prostitution operated by a pimp and bookmaker named Jimmy Smith. Phillips had been demanding money from Smith and, when Smith again refused to pay, Phillips shot him in the head at point blank range and killed him. Phillips then shot two eyewitnesses, Sharon Stango, a nineteen-year-old prostitute who worked for Smith, and Charles Gonzalez, a customer at the bordello. Ms. Stango was killed, but Gonzalez, though seriously wounded, survived. After the shootings, Phillips calmly rang for the elevator, rode to the lobby, thanked a handyman for opening the door for him and walked off into the night.

An investigation of the murders met with no success until late 1971, when Phillips, who had been caught extorting payoffs from a notorious madam, testified at the televised hearings on police corruption conducted by the highly publicized New York City Knapp Commission. At that time, a detective who had been assigned to investigate the Smith-Stango murders realized that Phillips resembled the composite sketch of the killer which had been obtained from the eyewitnesses. The investigation culminated in Phillips' indictment by a New York County grand jury for the murders of Smith and Stango and the attempted murder of Gonzalez (Ind. No. 1370-72). Phillips proceeded to trial on June 28, 1972. On August 9, 1972, the jury reported itself unable to reach a verdict, and a mistrial was declared.

Between the first and second trials, there came to light evidence which destroyed Phillips' alibi, as well as evidence showing that he, despite his denial, had possessed a sweater identical in color to that worn by the killer. The second

trial resulted in conviction for both murders and for the attempted murder and Phillips was subsequently sentenced to a term of from twenty-five years to life imprisonment.

The Trial

Phillips' second trial, the subject of the instant petition, began before New York State Supreme Court Justice Harold Birns on September 16, 1974. During the nine-week trial, forty-four witnesses, including Phillips, testified.

Charles Gonzalez, the surviving victim, identified Phillips as the man who shot him, after shooting Jimmy Smith and Sharon Stango at point blank range in the head (Gonzalez: 634-38).[2] Richie Stevens, the handyman of Smith's building, also identified Phillips as the man who entered the building moments before the killings, went up to Smith's apartment, and then left the building moments before the bodies were discovered (Stevens: 2090-91, 2101-03). There was also testimony from several of Smith's prostitutes and customers that Phillips had been shaking down Smith for money since 1965, had repeatedly come to Smith to demand money as Christmas Eve, 1968 approached, and, the night before the murders, had threatened to "blow Smith's fucken head off" if Smith did not pay him $1,000 the following day (Rogers: 1381, 1387; Charmello: 2334-42, 2347-48, 2356, 2488-89; Stevens: 2082; Lee: 1110; Schafer: 1252, 1277; Connolly: 939-40).

Phillips denied having committed these crimes. He admitted extorting money from Smith but denied any contact with him after 1965 (Phillips: 4223-26, 4237-38, 4506-08). He also presented an alibi defense and called several relatives and friends in an attempt to show that he and his wife were in Queens at the time of the shootings (Phillips: 4493-99; Mrs. Phillips: 3431-36, 3439-40; Slack: 3173, 3186-

2. Page references in this section refer to the minutes of Phillips' second trial.

87; J. McKee: 3726; M. McKee: 5250-51; Leavy: 3800-06; Callahan: 5228).

During cross-examination of Phillips, a tape recording of statements he made while cooperating with the Knapp Commission was played. This recording showed that Phillips had admitted, contrary to what he had said in direct examination, that he was extorting $100 monthly from Jimmy Smith after 1965 (Phillips: 5195). On cross-examination, Mrs. Phillips admitted having told a police officer between the first and second trials that she had lied at the first trial when she testified that Phillips was with her at the approximate time of the murders (Mrs. Phillips: 3554-56). Also on cross-examination, Phillips admitted he knew that the murderer had been described as wearing a green turtleneck sweater, but maintained that he did not own such a sweater and that he never wore green clothes (Phillips: 4692-93). In rebuttal, the People introduced three photographs taken by Henry Bergman, Phillips' business partner, showing Phillips wearing different green shirts (Bergman: 5462-66; Peo. Exhs. 112A, B, D). Bergman also recalled seeing Phillips dressed in green clothes on several occasions, including a green striped polo shirt, a green banlon shirt, and a forest green turtleneck sweater (Bergman: 5457-59).

On November 21, 1974, after only nine hours of deliberation, the jury convicted Phillips of the murders of Smith and Stango and the attempted murder of Gonzalez.

The Post-Verdict Motion and Hearing on Juror and Prosecutorial Misconduct

Background

On October 22, 1974, in the midst of trial, juror John Dana Smith wrote a letter in which he applied for a position as a civilian investigator with the New York County District Attorney's Office.

His letter did not indicate that he was a juror. The trial prosecutors learned of the application on November 14. The prosecutors, after assuring that no one from their office would contact the juror about the job, believed that no further action, *i.e.*, informing the court or defense counsel, was necessary.

After the verdict, on December 4, 1974, assistant district attorney LaPenta became concerned with what he felt were false public statements and accusations (unrelated to the juror issue) which Phillips' trial counsel had made concerning the prosecution (LaPenta: H 396).[3] He told John Keenan, the Chief Assistant District Attorney, about Smith's application (LaPenta: H 397; Keenan: H 553-54). Mr. Keenan immediately summoned to his office all those assistant district attorneys who knew about the matter (Keenan: H 556-64). After speaking to the assistants, Keenan notified then District Attorney Richard Kuh (Kuh: H 806-12). Mr. Kuh brought the matter to the attention of the court and the defense on December 9, 1974, the first date the court and defense counsel were available.

When the application was disclosed, Phillips moved, pursuant to New York Criminal Procedure Law section 330.30(2), for a new trial. He alleged that Smith was a biased juror in the control of the prosecution. On December 9, 1974, a hearing began before the trial judge, Justice Harold Birns, at which there was testimony from juror Smith, the trial prosecutors, and all of those who were involved in or knew about Smith's application.[4]

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3. Numerical references preceded by "H" are to pages of the transcript of the post-verdict hearing, which has been transmitted to the Court as part of the record on appeal.

4. The hearing also concerned another juror, Lawrence Bethel. During trial, the prosecutors learned that Bethel had been arrested for possessing narcotics several months prior to trial. Bethel's case

(footnote continued on next page)

The Hearing

Smith was sworn as the third juror on September 24, 1974. He was examined on the voir dire by both parties on September 23, 1974. A Vietnam veteran, he said that he expected to graduate from the Columbia University School of General Studies in October 1974, that he planned a career in law enforcement, and that he had an application pending for a position as an investigator with a federal drug enforcement agency (SVD 5).[5] Smith had worked as a store detective for Bloomingdale's Department Store for one year during 1972 and 1973 and had made several arrests, after which he had cooperated with the New York County District Attorney's Office (SVD 6). In addition, Smith's wife was interested in the criminal justice system and was studying criminology at John Jay College (SVD 4). She had been the victim of a robbery in which she had been stabbed and seriously injured (SVD 9). Her assailant had been prosecuted by the New York County District Attorney's Office (*id.*).

Defense counsel was extremely sensitive to Smith's candid expression of interest in law enforcement. So he asked Smith the following question:

> You've sort of been on the side of the law and law enforcement, making arrests for Bloomingdale's and now you are about to be appointed with a law

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had been adjourned in contemplation of dismissal upon his agreement to cooperate as a witness in the case pending against the man who had sold him drugs. The prosecutors revealed these facts at the close of evidence, and the juror was excused upon consent of the parties before jury deliberations began. Neither the circuit nor district courts reached the issue of whether Bethel's presence on the jury prior to jury deliberations prejudiced Phillips; consequently, the hearing evidence concerning Bethel will not be related here.

5. Numerical references preceded by "SVD" are to the minutes of Smith's voir dire examination. These minutes, which were introduced in evidence at the post-verdict hearing, have been transmitted to this Court as part of the record on appeal.

> enforcement agency with the Federal Government. Obviously in this case Bill Phillips is being accused and being prosecuted by the District Attorney's Office and members of the Police Department in the City of New York, who are a central part of law enforcement—and I'm sure you are aware from your background of what you know—that Bill Phillips sits here in this case just like in every criminal case; and our system of law says that he's presumed to be innocent. Now, do you feel that in this particular case, in spite of your experience, that the term presumption of innocence, as applies in this case, is not just theoretical, but the real meaningful law? Will you be able to keep that in mind? (SVD 20-21).

Smith said that he would presume Phillips to be innocent (*id.*). He assured defense counsel that if he had a reasonable doubt about Phillips' guilt, he would not hesitate to acquit (SVD 22). He also told the prosecutor that he would be a "fair and impartial juror in the case" (SVD 15-16).

Despite his interests, his experience in law enforcement and his obvious desire to work in that field, Smith was accepted by the defense without challenge—even though the defense had peremptory challenges available.[6]

Thereafter, during the trial, Smith had lunch with a friend, Rudy Fontane, a Criminal Court officer (Smith: H 62-65; Fontane: H 126). They discussed their mutual interest in careers in law enforcement. Fontane said that he was thinking of applying for a position as a rackets investigator in the District Attorney's Office (Smith: H 62-64; Fontane: H 128). Fontane also said that he had heard that a federally funded position for a major felony investigator had opened in the District Attorney's Office. Upon hearing this, Smith said that he was interested in the major felony position. Fontane then said that he would inquire of

6. Each party had 20 peremptory challenges. The defendant used only 12 in the entire voir dire.

a friend in the District Attorney's Office about how to apply for the job. Fontane never suggested to Smith that his friend could use influence to help Smith get the job (Fontane: H 129-31, 134). Smith later discussed the job with Wallace Reilly, his former boss at Bloomingdale's and a former Legal Aid lawyer. Reilly suggested that Smith apply for the position (Smith: H 60).

Fontane contacted Michael Mulderrig, one of the District Attorney's civilian investigators. Without mentioning Smith, Fontane inquired how one would apply for a position as an investigator (Fontane: H 131; Mulderrig: H 199). Mulderrig said that a resume should be sent directly to the District Attorney (Fontane: H 134; Mulderrig: H 200). Fontane also spoke with Mario Piazza, a grand jury warden, and asked where a friend of his, whom Fontane did not name, should send an application for a position as an investigator. Piazza promised to inquire within the District Attorney's Office (Piazza: H 226-29, 236).

Fontane told Smith that he had learned that Smith should simply file an application and resume with the District Attorney's Office (Smith: H 736-38; Fontane: H 160). On or about October 22, 1974, Smith gave his letter of application to Fontane, who mailed it to the District Attorney's Office (Smith: H 69-70; Fontane: H 135-36). Fontane later told Smith only that he had "taken care of" the letter. He never told Smith about any particular inquiries made on Smith's behalf, either before or after submitting the application (Smith: H 736-38; Fontane: H 160). Smith's application did not mention that he was a juror.

About one week later, Piazza fortuitously met Fontane and Smith, who were having lunch in a bar. Fontane introduced Smith to Piazza and said that Smith was the friend who was applying for a job with the District Attorney's Office (Piazza: H 229-31, 235; Smith: H 79-80,

738). Other than the exchange of greetings upon being introduced to one another, Piazza and Smith had no conversation and Piazza did not join Smith and Fontane for lunch (Piazza: H 229-32, 235). Smith never asked Piazza to make inquiries on his behalf and was not told if Piazza did so (Smith: H 80).

Smith's application was received at the District Attorney's Office on October 23 and was forwarded to Kenneth Conboy, then the Administrative Assistant District Attorney (Chief Assistant District Attorney Keenan: H 544-45). Conboy was on vacation. Upon his return, on about November 9, Conboy sent Smith's application to Joan Sudolnik, the assistant district attorney in charge of the Major Felony Program (Sudolnik: H 303; Keenan: H 545). Ms. Sudolnik in turn referred the application to John Lang, the assistant district attorney who was handling employment applications for the program (Sudolnik: H 310).

Thereafter, again without Smith's knowledge, Fontane met assistant district attorney Robert Holmes and mentioned his (Fontane's) and Smith's applications (Fontane: H 141; Smith: H 735-38). Fontane also said that Smith was a juror in the Phillips case (Fontane: H 143; Holmes: H 280-81). This was the first time that anyone associated with the District Attorney's Office heard that a juror had applied for a job. On November 13, 1974, Holmes promptly told Sudolnik what he had learned (Holmes: H 283-84). Sudolnik immediately obtained Smith's application and discovered that no one had responded to it. She instructed Lang and her secretary not to correspond with Smith until after the Phillips trial, and she attached a note to that effect to the application (Holmes: H 285; Sudolnik: H 307-10; Lang: H 361).

On November 14, Ms. Sudolnik met Litman and his associate, Phillip LaPenta, and told them about Smith (Su-

dolnik: H 311; LaPenta: H 388; Litman: H 941-42). Litman, who was then preparing for a crucial stage of Phillips' cross-examination, asked whether Smith had been contacted and whether Smith's application indicated that he was a juror (Litman: H 943). Ms. Sudolnik said that no one had responded to the application and that it consisted of a form letter and resume and contained no reference to Smith's jury service (Sudolnik: H 313; LaPenta: H 391; Litman: H 944-45). Litman said that he did not wish to know about anything contained in Smith's resume, since he felt that it would be improper for him to know anything which had not been disclosed on the voir dire (Litman: H 946). He then directed Sudolnik not to have any contact with Smith.

Litman and LaPenta discussed what they had learned and concluded that, because, on the vior dire, Smith had candidly revealed that he wanted a career in law enforcement, that he had actually applied for such jobs, and that he had had many previous contacts with the District Attorney's Office, it was not improper for Smith to have applied for a job in the District Attorney's Office (LaPenta: H 414; Litman: H 950-51). Litman and LaPenta believed that as long as no one in the District Attorney's Office contacted Smith and that they, the trial assistants, learned nothing about Smith which was not disclosed on the voir dire, there was no reason to tell the court and the defense about Smith's application (LaPenta: H 413-14, 421; Litman: H 950-55, 967-73).

The verdict against Phillips was returned on November 21, 1974. Up to that time, there had been no contact, direct or indirect, between the District Attorney's Office and Smith (Smith: H 76, 730). The day after the jury had been discharged, Smith telephoned Ms. Sudolnik to ask about his application. He did not mention that he had been a juror

in the Phillips case (Smith: H 66). She did not recall receiving Smith's call (Sudolnik: H 332, 773), but Smith testified that she told him that his application would have to be processed through the New York City Department of Personnel (Smith: H 67). Thereafter, Smith called his former supervisor, Wallace Reilly. Since Reilly knew several assistant district attorneys, Smith asked Reilly to call Sudolnik to ascertain Smith's chances for employment (Smith: H 67; Reilly: H 164). Reilly then learned from Sudolnik that hiring would be based on experience (Smith: H 67; Reilly: H 164; Sudolnik: H 772). When Smith learned this, he abandoned hopes of being hired by the District Attorney's Office (Smith: H 67).

At the hearing, Smith testified that he felt that there was nothing improper in his applying for a job at the District Attorney's Office while he was a juror (Smith: H 725). He had disclosed on the voir dire that he had an application pending with the Drug Enforcement Administration, and during trial he had applied for a position with another federal agency, The Bureau of Alcohol, Tobacco, and Firearm Control (Smith: H 719-20). Smith then engaged in the following colloquy with Phillips' attorney:

> Question: Do you think that [being a juror] might have helped you, that might have been helpful in considering you as an applicant for the job?
>
> Answer: Mr. Rothblatt, I swore an oath to listen to the evidence and to render a verdict on that evidence. I did so.
>
> Question: I didn't ask you—
>
> Answer: To imply that I worked the jury's mind is repugnant to me and to the other jurors.
>
> Question: I didn't ask you that.
>
> Answer: Well, I'm telling you that this wasn't in my mind. I didn't consider it favorable. Miss Sudol-

nik had nothing to do with this case so far as I'm concerned (H 747).

* * *

Question: Did you think that you would be considered for this job as investigator for the District Attorney's Office if you voted to acquit Mr. Phillips? Yes, or No.

Answer: I didn't think about whether or not to acquit or convict Phillips had anything to do with the job. I didn't think about it at all, one way or the other (H 748-49).

* * *

Question: You mean you never thought for a moment that an acquittal in this case, the people in the District Attorney's Office would look upon you unfavorably as an investigator working for their staff if you felt that Mr. Phillips was entitled to an acquittal; is that what you're telling us?

Answer: Yes, that's what I'm telling you. Why would the DA's Office care about my actions as a juror? You're the one who's suggesting it, no one else—(H 750).

The Trial Court's Decision

In a decision dated January 20, 1975, Justice Birns denied Phillips' motion to set aside the verdict. Justice Birns concluded that although Smith's letter was "indeed an indiscretion, in light of his voir dire [the letter] in no way reflected a premature conclusion as to the defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence" (*id.* at 51a). The trial judge based his conclusion upon "an examination of all the facts and circumstances disclosed at this hearing" (*id.* at 51a), which in the court's view, showed that Smith's application reflected no "state of mind on the part of this juror other than that acknowledged by the defense when it accepted the juror"

(*id.* at 43a); that Smith's "predilection for law enforcement was well known to the defense" (*id.* at 43a); that it was Smith's "faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney and ignore the possible construction which might be placed upon such action" (*id.* at 43a-44a); and that "no dialogue or bilateral communication between Juror Smith and representatives of the District Attorney's Office has been established" (*id.* at 51a).

Justice Birns also rejected Phillips' contention that the verdict should be set aside because the prosecutors acted improperly in the manner in which they disclosed Smith's application, and because their failure to disclose the application immediately made it impossible for the court to discharge the juror during trial. Justice Birns noted that the statutes governing challenges to jurors prior to verdict (New York Criminal Procedure Law §§270.35[2] & 280.10 [1]) require that the jurors have engaged in "substantial misconduct." Under New York law, this means misconduct "of such import as to affect adversely the ability of the juror to sit fairly and impartially assess the issues on trial" (*id.* at 55a). Smith's application did not, in fact, render him partial or biased. Therefore, although the prosecutors exercised poor judgment in failing to disclose the application earlier, Phillips would not have been entitled to dismissal of Smith even if the application had been disclosed prior to jury deliberations, and the trial judge would have denied any such motion (*id.* at 56a).

In sum, Justice Birns concluded that Smith was an impartial juror beyond a reasonable doubt and, despite the mistake in judgment on the part of both Smith and the prosecutors, there was no showing of juror bias which would have required a new trial (*id.* at 57a).

The State Post-Conviction Proceedings

Direct Appeal

On appeal to the Appellate Division, First Department, Phillips renewed his claim, made in his post-verdict motion, that he was prejudiced by the juror misconduct and by the prosecutors' conduct as well. Phillips also contested the sufficiency of the evidence, a number of the trial court's evidentiary rulings, and portions of the charge. On April 26, 1976, the Appellate Division unanimously affirmed, without opinion, Phillips' conviction. 52 A.D.2d 758, 384 N.Y.S. 2d 715. On May 28, 1976, leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles Breitel. 39 N.Y.2d 949, 386 N.Y.S.2d 1039.

State Collateral Attack

On April 25, 1978, Phillips moved in New York Supreme Court, New York County, to vacate the judgment of conviction, pursuant to New York Criminal Procedure Law section 440.10. He argued, *inter alia*, that even though he was granted immunity by United States Attorney Whitney North Seymour, Jr. for a tape recording which he made for the New York City Knapp Commission, the recording was still introduced at trial to show that he was extorting money from one of the murder victims, Jimmy Smith, since 1965. On January 3, 1979, New York State Supreme Court Justice Irving Lang summarily denied the motion on the ground that the claim of immunity had not been made before trial and thus, under state law, Phillips had forfeited his right to judicial review of that claim. 97 Misc. 2d 665, 412 N.Y.S.2d 94. On February 15, 1979, leave to appeal to the Appellate Division, First Department, was denied by Presiding Justice Francis T. Murphy, Jr.

The Federal Habeas Corpus Proceeding

The District Court Decision

On April 5, 1979, Phillips sought habeas corpus review in the United States District Court for the Southern District of New York. The thrust of the petition was Phillips' contention that the tape recording admitted to impeach him had been immunized by United States Attorney Seymour. On May 25, 1979, Phillips filed what he called a "supplemental petition" simply alleging, without supporting argument, a denial of due process based upon the facts adduced at the state post-verdict hearing concerning juror and prosecutorial misconduct.

District Court Judge Pierce did not reach the issues of whether immunized testimony was admitted at trial. Rather, he granted the writ of habeas corpus solely on the ground that juror Smith was "impliedly biased." Judge Pierce indicated that the record supported fully the trial court's finding that Smith's judgment was not influenced by his application and that Smith was therefore not actually biased. Judge Pierce noted that petitioner had ample opportunity to adduce evidence of actual bias, and that the trial judge, who concluded that there was no actual bias, had observed the demeanor of all the witnesses, including juror Smith, who testified at the post-verdict hearing (App. B, 25a).

Despite the fully supported conclusion that Smith was in fact an unbiased juror, Judge Pierce found that there was a "conclusive presumption" of bias (*id.* at 26a), because "it is reasonable to conclude that the average person in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application" (*id.* at 27a). Judge Pierce, although not grounding his decision on a finding of prosecutorial misconduct,

noted that because the trial prosecutor failed to bring Smith's letter to the attention of the trial judge before the jury retired to deliberate, he "must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right" (*id.* at 29a).

The Second Circuit Decision

On September 26, 1980, by a 2-1 decision, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment. The majority, unlike Judge Pierce, did not rest its decision on "implied bias." Rather, the majority seemingly accepted the invitation of respondent to begin "cleansing" from the state criminal justice process the allegedly "endemic misconduct" of prosecutors (Second Circuit Brief for Appellee: 31).

Accordingly, relying on *United States* v. *Agurs*, 427 U.S. 97 (1976), the majority concluded that the prosecutor's failure to disclose the juror's job application violated Phillips' right to due process of law, regardless of the juror's actual impartiality (App. A, 9a-10a). The majority reasoned that if the job application had been reported to the judge during trial, there was a substantial likelihood that the judge would have excused the juror. On the other hand, at a post-verdict hearing, it was not likely that the judge would set aside the verdict because of the juror's application (*id.* at 7a, 10a). Thus, according to the majority, Phillips was prejudiced by the prosecutor's failure to disclose, notwithstanding the fully supported conclusion that the juror was actually impartial (*id.* at 10a).

In dissent, Judge Van Graafeiland agreed that the trial prosecutor had been wrong in not disclosing the juror's application but concluded that this failure had not prejudiced Phillips because the juror was found to have been

actually impartial. Judge Van Graafeiland made the point, undisputed by the majority, that the state post-trial hearing into the juror's impartiality was precisely the procedure required by this Court as well as the Second Circuit (*id.* at 11a). Judge Van Graafeiland noted that the majority did not dispute that the state hearing record supported the trial judge's finding of impartiality. Thus, it was clear that habeas corpus was granted solely because of prosecutorial misconduct, although there was no prejudice (*id.* at 12a). Given the absence of prejudice, Judge Van Graafeiland believed that, rather than interpreting the Constitution, the majority was exercising supervisory powers over the administration of justice in the state courts, thereby usurping the power of the state judiciary (*id.* at 12a).

On October 10, 1980, the State sought rehearing and rehearing *en banc,* which the Court of Appeals denied on December 8, 1980. On January 1, 1981, the State filed its petition for a writ of certiorari, which was granted on February 23, 1981.[7]

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7. Phillips has remained in custody throughout the federal proceedings. After the district court granted habeas corpus relief, he unsuccessfully sought bail from state court, as well as the district court, the Second Circuit and Mr. Justice Marshall. After the circuit court affirmed the judgment granting habeas corpus, a state Supreme Court justice granted bail. However, the Appellate Division of the New York State Supreme Court prohibited petitioner's release because the grant of habeas corpus did not become effective until issuance of the mandate; thus, there were still valid state convictions for murder and state law prohibited bail for persons so convicted. Subsequently, the Second Circuit denied motions for bail or immediate issuance of the mandate and then stayed the mandate pending an application for certiorari. Subsequently, Mr. Justice Marshall denied an application to vacate the stay of the mandate which, following the granting of certiorari, continues in effect until a decision by this Court. Finally, a New York State Supreme Court justice sitting in Wyoming County denied a state petition for habeas corpus; respondent filed a notice of appeal from that denial but as of May 21, 1981, that appeal has not been perfected.

Summary of Argument

In this most significant state prosecution of a corrupt police officer charged with murder, there is no dispute that the state trial prosecutor wrongly failed to disclose during trial that a sitting juror had sent a letter applying for a job with the District Attorney's Office. Disclosure was made after trial, by the District Attorney himself; the state trial judge held a full post-trial hearing and found that the juror was in no way influenced by having applied for a job. The Second Circuit ignored these findings and, absent any demonstrable prejudice, granted habeas corpus relief solely because of the prosecutor's failure to disclose. However, prosecutorial misconduct that does not create actual prejudice provides no legal basis for a federal habeas court to interfere with the state criminal justice system and order the release of a state prisoner.

In this case the information withheld during trial was material to a determination of whether Phillips was afforded his constitutional right to an impartial jury trial. By contrast, other cases involving a prosecutor's duty to disclose that have come before this Court concerned prosecutorial failure to disclose exculpatory evidence. Such a failure affects an accused's constitutional right to be convicted only on proof establishing guilt beyond a reasonable doubt, and the right to present evidence on his own behalf.

The distinction between the constitutional rights involved in this case and the other category of cases is crucial. The distinction is crucial because in these other cases, once it was found that the prosecutor, by failing to disclose, had violated an accused's right to present material evidence to a jury, the appropriate remedy was to afford the accused an opportunity to present that evidence to a jury. Since the original jury was no longer available, a new trial was the only appropriate remedy.

However, claims concerning juror bias are decided by a judge who, unlike a jury, is available after trial to hold a hearing and make findings of fact and conclusions of law. A hearing after trial affords a judge the same opportunity to decide the claim of bias as he would have had if disclosure had been made during trial. Indeed, under a long line of federal cases starting with this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954), a post-trial hearing has been the remedy for post-verdict claims based upon alleged juror bias.

Accordingly, in this case, where evidence of possible juror bias was withheld from the judge during trial, a post-trial hearing to determine the pending application's influence, if any, on the juror was the appropriate initial remedy. If after that hearing the judge had concluded that the juror was, in fact, influenced, then the judge would have had to order a new trial. Here, however, the juror was found impartial and no new trial was required.

Put simply, if the prosecutor had disclosed the letter during trial, the Constitution would have required the trial court to conduct a hearing to decide whether the juror could no longer remain impartial once he made the application. The same inquiry can be and was made after trial; thus, there was no prejudice arising from the prosecutor's failure to disclose.

Of course, to deter future prosecutorial conduct of this kind, a court having supervisory power could choose to ignore the lack of prejudice and simply reverse to assure disclosure in the future. Unfortunately, the majority below failed to understand that on a federal habeas corpus challenge to a state conviction, a federal court has no supervisory powers and can only grant the writ when a state prisoner has been actually prejudiced by prosecutorial misconduct. As stated by Judge Van Graafeiland dissenting

below, the prosecutor's conduct, no matter how improper, did not prejudice respondent's right to an impartial jury. Here there was no such prejudice because, as required by *Remmer*, the state judge, in a full, fair and adequate post-trial hearing, found beyond a reasonable doubt that the juror was not influenced by the pending application.

Under 28 U.S.C. §2254(d), those findings are presumed correct. Here that presumption is fully supported by the evidence at the state hearing. That evidence demonstrates eloquently and persuasively that the juror was in no way influenced by the fact that he had sent a letter applying for an investigator's position with the District Attorney's Office.

Nor does the Constitution, as the district court held, require that the application be treated as having given rise to a conclusive presumption of bias, which could not be rebutted by the hearing evidence. As seen from another long line of federal cases commencing with *United States* v. *Wood*, 299 U.S. 123 (1936), the Constitution, unlike the statutes and common law of some jurisdictions, does not require a challenge to potential jurors for cause based upon a conclusive presumption of bias, *i.e.*, "implied bias." Rather, the Constitution requires only that the trial judge follow appropriate procedure to assure that prospective jurors are free from actual, as distinguished from implied, bias.

Moreover, even where established by statute or common law, the doctrine of "implied bias" applies only during jury selection. Subsequent challenges to jurors must be based upon a finding of actual bias on the part of the particular juror.

In this state prosecution, after the appropriate post-trial inquiry, the juror in question was found to have been, in fact, impartial. Thus, the respondent was convicted by

twelve impartial jurors and thereby afforded the jury trial guaranteed by the Constitution. Given the finding of impartiality, the respondent suffered no prejudice from the failure to disclose and, absent prejudice, the federal courts below simply had no legal basis to invalidate a seven-year-old state conviction and order a new trial for an accused charged with a crime committed twelve years ago.

POINT

The prosecutor's failure to disclose that during trial a juror had applied for a job in the District Attorney's Office did not prejudice respondent's constitutional right to an impartial jury trial because the Constitution requires only that jurors be actually impartial and, as required by this Court, the state judge held a post-trial hearing and found beyond a reasonable doubt that the juror was not biased.

Introduction

In the absence of prejudice, a federal court may not grant habeas corpus relief to a state prisoner based upon prosecutorial misconduct. Yet, without disagreeing with the state judge's finding of impartiality and pointing to no prejudice resulting from the prosecutor's failure to disclose, the circuit court majority held that the writ was properly granted because "the prosecutor may not keep silent when he knows that a juror has applied to become his employee" (App. A at 10a).

To demonstrate that Phillips was not prejudiced by the prosecutor's failure to disclose the letter of application until after trial, we will show that the state post-trial hearing to determine whether the juror was biased was constitutionally equivalent to any procedure which could have been conducted during trial. Next, we will show that because the full, fair and adequate post-trial hearing established that

the juror was not biased, it follows that the prosecutor's failure to disclose in no way prejudiced the defendant. We will then analyze the state judge's findings and conclusions about the juror's impartiality—which are, of course, presumed correct—to show that they are indeed fully supported by the record.

The district court, however, held that the findings and conclusions by the state judge were irrelevant because the juror's letter created a conclusive presumption of bias which could not be rebutted. The district court also erred. It erred because, as will be shown, the Constitution requires only the exclusion of jurors who are actually biased and in determining that question, there is no constitutional requirement calling for application of a conclusive presumption of bias.

(1) The prosecutor's failure to disclose the juror's letter during trial did not prejudice respondent's right to an impartial jury because the state judge conducted a post-trial hearing to determine the juror's impartiality, which is the constitutional equivalent of any procedure that would have been held during trial.

The court below held that respondent should be given a new trial because the trial prosecutor failed to disclose during trial that a juror had applied for a position in the District Attorney's Office. In so holding, the circuit majority incorrectly relied on *United States* v. *Agurs*, 427 U.S. 97 (1976). The *Agurs* case addressed the consequences of a prosecutor's failure to disclose evidence relevant to the jury's determination of guilt or innocence. This Court concluded that only an accused who is actually prejudiced by such a failure to disclose is entitled to a new trial (*id.* at 106, 108, 111-12). Whether an accused has been prejudiced turns on whether the withheld evidence is "material,"

i.e., whether the jury would or could have been influenced by that evidence (*id.* at 103-04, 112, 113).

By definition, the duty to disclose evidence that might have influenced the jury defined the remedy for its breach. Once the jury has been discharged, only a new trial, before a new jury, can cure the prejudice of a verdict which might have been obtained as the result of the prosecutor's failure to disclose material evidence to the accused. With the new trial, the accused is accorded the fair proceeding to which he was entitled and which was denied by the prosecutor's failure to disclose.

This case involves, not the failure of a prosecutor to disclose evidence that might have affected a jury, but rather a prosecutor's failure to disclose information which, according to the majority below, had a "fair likelihood" of affecting a judge's determination concerning a juror's impartiality (App. A at 10a). The majority below simplistically applied *Agurs* to this case and concluded that here, as in *Agurs*, a new trial was the appropriate remedy for the prosecutor's breach of duty. This simple conclusion is erroneous.

It is erroneous because, as noted, when the evidence withheld could have affected the factual determination of guilt or innocence, that determination must be made by a jury after a new trial. On the other hand, a determination by a judge, such as a finding respecting a juror's impartiality, which can be made by the judge during trial, can also be made at a post-trial hearing without a new trial. Thus, when a juror's impartiality is in question, a defendant is not prejudiced by a failure to disclose relevant information during trial, if the information is disclosed after trial and the juror is found to have been unbiased following a post-trial hearing. This is the teaching of *Remmer* v. *United States*, 347 U.S. 227 (1954), a case ignored by the

majority opinion despite reliance upon it by Judge Van Graafeiland in dissent.

In *Remmer*, this Court ordered a post-trial hearing into the possibility that a juror was affected in his deliberations by an event that occurred during trial. That event was an interview of the juror by the FBI, which was investigating a purported attempt to influence the juror's verdict. During trial, both the judge and the prosecutor knew of the FBI investigation but defense counsel was never so informed.

In the course of its opinion in *Remmer*, the Court noted that there is a presumption of prejudice when, during trial, a juror and non-juror communicate about a matter pending before the jury. Nonetheless, the Court recognized that this presumption is not conclusive and may be rebutted by evidence introduced at a post-verdict hearing.[8] 347 U.S. at 229; *see also Mattox* v. *United States*, 146 U.S. 140, 150

8. Here, in contrast to *Remmer*, the communication by the juror did not specifically relate to a matter before the jury. In such circumstances, the Second Circuit has placed the burden on a defendant to show prejudice. *United States* v. *Brasco*, 516 F.2d 816, 819 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). No circuit has gone beyond the *Remmer* standard and created a conclusive presumption of prejudice because of communication between a juror and non-juror. The District of Columbia and First Circuits have held that any communication between a juror and a non-juror creates a rebuttable presumption of prejudice. *Ryan* v. *United States*, 191 F.2d 779, 781 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 928 (1952); *United States* v. *Doe*, 513 F.2d 709, 711-13 (1st Cir. 1975). The Ninth Circuit has indicated that it will apply the rebuttable presumption of *Remmer* where the person with whom the juror communicates is interested in the result of the trial, *United States* v. *Love*, 535 F.2d 1152, 1155-56 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976), and the Fifth Circuit has said that any communication between a juror and a prosecutor, whether or not relating to the matter at trial, raises a rebuttable presumption of prejudice. *Pekar* v. *United States*, 315 F.2d 319, 322 (5th Cir. 1963). In any event, regardless of how the rebuttable presumption is characterized or which party has the burden of proof, here the state judge required the prosecutor to establish the absence of prejudice beyond a reasonable doubt and after a hearing found that this burden had been satisfied. *See* App. E at 57a and discussion at pp. 34-39, *infra*.

(1892). Indeed, there is an entire body of federal law, including decisions by the Second Circuit, recognizing the appropriateness of post-verdict inquiry in cases involving improper juror communication during trial. *See, e.g., United States* v. *Johns,* 615 F.2d 672, 676 (5th Cir.), *cert. denied,* —— U.S. ——, 101 S. Ct. 95 (1980); *United States* v. *Gross,* 614 F.2d 365, 368 (3d Cir.), *cert. denied,* 447 U.S. 925 (1980); *Sullivan* v. *Fogg,* 613 F.2d 465, 467 (2d Cir. 1980); *Winters* v. *United States,* 582 F.2d 1152, 1153-54 (7th Cir.), *cert. denied,* 439 U.S. 936 (1978); *Eaton* v. *Wyrick,* 528 F.2d 477, 480-81 (8th Cir. 1975); *United States* v. *Brasco,* 516 F.2d 816, 819 (2d Cir.), *cert. denied,* 423 U.S. 860 (1975).

Notably, in his opposition to certiorari, respondent agreed that generally a post-verdict hearing is the appropriate procedure to determine whether a sitting juror has engaged in conduct that has improperly influenced the juror to vote for conviction. Brief in Opposition to Certiorari pp. 5-7. Nonetheless, he argued that *Remmer* should have no application here because the alleged influence on juror Smith resulted from the conduct of the juror himself —his application for a job—rather than from communication or pressure from an outside source. *Id.* Given this "internal" source of the influence, according to respondent, it is just too difficult to determine whether the juror was affected by the pending letter of application.

This distinction is unpersuasive. The difficulty in determining the effect, if any, of the pending application stems from difficulty inherent in determining a person's state of mind, not from the particular source of the influence on the person. With full exploration of the facts, events and circumstances by cross-examination of the juror as well as other witnesses, there is no reason why the hearing judge could not determine whether the pending application influ-

enced juror Smith, just as the Court in *Remmer* could decide the effect of the FBI inquiry. Notably, neither the district nor the circuit court found the source of the influence to be controlling. Indeed, in federal cases, hearings have been held without regard to the source of the influence. *Compare United States* v. *Johns,* 615 F.2d at 676, *supra* (foreman told by alternate juror that a witness had been killed), *with Sullivan* v. *Fogg,* 613 F.2d at 466-67, *supra* (juror heard voices during trial telling him to acquit but he voted guilty).

In ignoring *Remmer,* the majority below seemed troubled that because of the prosecutor's silence, the hearing on the alleged bias of juror Smith had to be held after trial, rather than before deliberations, when an alternate could have replaced Smith. This concern, however, is misplaced. If we assume that the prosecutor had himself discovered the letter only after the verdict, a post-trial hearing would have been the proper means of determining whether the juror had been actually biased. *See* cases cited in text at p. 26, *supra.* If a post-trial hearing would have been adequate to protect Phillips' sixth amendment right to an impartial jury in that circumstance, there is no reason why such a hearing was any less adequate simply because the prosecutors knew about the letter at an earlier point in time.

There are many reasons why the post-trial hearing required by the *Remmer* case is as adequate as a hearing during trial. In both situations, the judge can observe the juror's reactions during trial as well as his or her demeanor during the hearing. Further, in both situations, the juror can be brought before the court without being told why, thereby preventing preparation for the particular inquiry.

Moreover, the post-trial hearing has at least two advantages over a hearing during trial. First, defense counsel, in cross-examining the juror, would not have to tread lightly in fear that, if his challenge were unsuccessful, he would

then be stuck with a juror who might well hold the cross-examination against his client. Second, at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern. Indeed, as required by *Remmer*, here counsel was given wide latitude to explore as he saw fit the circumstances surrounding the receipt of the letter, "the impact thereof upon the juror, and whether or not it was prejudicial . . ." 347 U.S. at 230.[9]

The *Remmer*-type hearing but reflects this Court's recent exposition in *United States* v. *Morrison*, —— U.S. ——, 101 S. Ct. 665, 668 (1981) (discussed at pp. 33-34, *infra*), during which it observed that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." This is also precisely the teaching of *Brady* v. *Maryland*, 373 U.S. 83, 88-90 (1963). In *Brady*, the information withheld was material only to the question of sentencing. Thus, this Court did not reverse the conviction and order a new trial. Instead, it affirmed the circuit court, which had ordered only a new sentence proceeding to remedy the prejudice from the failure to disclose the material evidence.

9. Interestingly, following the remand in *Remmer*, the district court, unlike the state judge here, reviewed the evidence by using an improper standard and concluded that the juror had not been affected by the FBI inquiry. This Court, using a standard similar to that used here by the state court, subsequently examined the record itself and concluded that the FBI investigation had indeed affected the juror. 350 U.S. 377, 379, 382 (1956).

In contrast to the all-encompassing hearing ordered by the Court in *Remmer*, Rule 606(b) of the Federal Rules of Evidence prohibits testimony about the jury's deliberations or about the effect of the outside influence on the minds of the jurors. The exclusion of testimony about an outside influence's effect on a juror's mind is, of course, in direct conflict with the scope of the hearing envisioned by *Remmer*. *See* 350 U.S. at 379, *supra*. *See also United States* v. *Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980). To the extent that the *Remmer*-type hearing is constitutionally mandated and a defendant wishes to show that a juror was in fact influenced, the evidence rule may have to be ignored. In any event, here, as envisioned by *Remmer*, the state court permitted counsel to explore fully the letter's effect on the juror.

In this case, it was also unnecessary to order a new trial. The information withheld was material only to the question of a juror's alleged bias, and thus the appropriate remedy was a hearing, like that in *Remmer*, to determine if the juror was biased. The finding of impartiality after the hearing meant that respondent had not been prejudiced by the failure to disclose; hence a new trial was not required.

Still, the majority below sought to finesse the requirement of prejudice by concluding that there was a "fair likelihood" that if informed of the juror's application during trial, the state judge would have exercised his discretion and replaced the juror regardless of the juror's actual bias (App. A at 10a). This supposition ignores the state judge's conclusion that even if the application had been disclosed during trial, he necessarily would have denied the motion to remove the juror because the juror was not biased (App. E at 56a). However, even assuming that the majority's speculation was correct and that the state judge did not mean what he said, respondent was still not prejudiced by the failure to disclose during trial. Smith was in fact found impartial, and respondent could not have been prejudiced merely because the state trial judge was denied an opportunity during trial to replace one impartial juror (Smith) with another.

Equally significant, and unmentioned by the majority, is that New York judges have no greater discretion to remove a juror during trial than do their federal counterparts.[10] The failure to mention that New York judges have no greater discretion than federal judges indicates that the

10. *Compare* N.Y. Crim. Proc. Law §270.35 (1975), and *People* v. *Genovese*, 10 N.Y.2d 478, 482-3, 180 N.E.2d 419, 422, 225 N.Y.S. 2d 26, 29-30 (1962), and *People* v. *West*, 38 A.D.2d 548, 549, 327 N.Y.S.2d 493, 495, *aff'd*, 32 N.Y.2d 944, 300 N.E.2d 734, 347 N.Y.S. 2d 203 (1973), *with* Fed. R. Crim. P. 24(c), and *United States* v. *Avila-Macias*, 577 F.2d 1384, 1387 (9th Cir. 1978), and *United States* v. *Moten*, 564 F.2d 620, 629 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977), and *Banks* v. *United States*, 204 F.2d 666, 671 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953).

opinion below is, in part, predicated upon the premise that the state judge would not be willing, after trial, to find that the juror was biased and would thus protect the verdict rather than Phillips' right to an impartial jury. *See* App. A at 7a, 10a. Yet, in federal court under *Remmer* and the other Second Circuit cases (*see, e.g.*, cases cited in text at p. 26, *supra*), a post-trial hearing into juror misconduct is adequate to protect an accused's right to an impartial jury.

Surely, the majority deviated from applicable principles by its failure to treat the state post-trial hearing the same way it would have treated a similar federal hearing under *Remmer*. In the words of Professor Bator, quoted with approval by Mr. Justice Powell in his opinion for the Court in *Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976): "[t]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 509 (1963).

True, these observations in the *Stone* case concerned adjudication of fourth amendment claims but, as made clear by Professor Bator, they apply with equal force to the adjudication of any constitutional claim, including one of juror bias. So that our position will not be misunderstood, we recognize that, unlike fourth amendment claims such as those at issue in *Stone*, claims involving alleged juror bias in a state prosecution may be reviewed in federal habeas corpus proceedings. Nonetheless, in habeas corpus review, federal courts must treat state hearings and the judges who hold them in the same manner and with the same respect afforded *Remmer*-type hearings held by federal judges. *See* 28 U.S.C. 2254(d); *Sumner* v. *Mata*, —— U.S. ——, 101 S. Ct. 764, 770-71 (1981) (discussed at pp. 34-35, *infra*).

Of course, in *Remmer*, because the trial judge knew about the FBI investigation, the failure to hold a hearing at trial on whether the juror had been affected by that investigation resulted from a judicial error, and in other cases the post-trial hearing occurred because of a juror's conduct which was not discovered until after trial. Here, the failure to hold a hearing resulted from a prosecutor's serious error in judgment. Nonetheless, if a post-trial hearing is the constitutional remedy for the failure to hold a mid-trial hearing because of an error by a judge or juror, there is no reason why a post-trial hearing should not also be the appropriate remedy when the fault for not having a hearing during trial lies with the prosecutor—unless, of course, the court below desired to punish the prosecutor. However, this Court has made clear that the governing principle in cases involving the failure to disclose "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). And in *Agurs* the Court expressly stated that the constitutional duty to disclose is not to be measured "by the moral culpability, or the willfulness, of the prosecutor." 427 U.S. at 110.[11] Indeed, even in the most

11. To be sure, as the state judge found, by failing to disclose the letter during trial, the trial prosecutor had made a "serious error in judgment" (App. E at 52a). Nonetheless, the decision not to disclose was made in the sixth week of a murder trial in the middle of cross-examining defendant, with the summation only a week away and with knowledge of a problem with another juror—Bethel. *See* discussion in note 5, at p. 11. Moreover, it was not completely unreasonable for the trial prosecutor to believe that the problem with the juror's application could be handled by directing that the District Attorney's Office make no contact with the juror. For, by so directing, the trial prosecutor avoided part of the problem presented in *Remmer* as the result of the FBI meeting with the juror. All of this is not to excuse the failure to disclose but to place it in context. And the state court recognized that it was the pressures of the case, not any desire to secure an unfair advantage, which "becloud[ed] the trial prosecutor's professional vision" and which led to the failure to disclose (*id.* at 51a-52a).

extreme situations, involving a prosecutor's knowing use of perjured testimony, prejudice is shown and reversal required only if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103; *accord, Giglio* v. *United States,* 405 U.S. 150, 154 (1972).

Perhaps a court, having supervisory powers over the conduct of a prosecutor, may desire to encourage future disclosure by punishing the prosecutor and ordering a new trial, even though an accused has not been prejudiced and would not otherwise have been entitled to a new trial. Given the departure of the court below from the accepted constitutional principles of *Agurs, Brady* and *Remmer,* the unavoidable conclusion is that this prophylactic device remains the only basis for the majority opinion. Indeed, Phillips in his brief to the court below expressly invited it to exercise such supervisory power (Second Circuit Brief for Respondent: 31). In accepting this invitation, the majority below has, however, gone well beyond the limited scope of federal habeas review. Under the statute defining this scope (28 U.S.C. §2254), habeas corpus review of a state court conviction based on prosecutorial misconduct is a "narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642 (1974). *See also Chandler* v. *Florida,* —— U.S. ——, 101 S.Ct. 802, 807 (1981). ("This Court has no supervisory jurisdiction over state courts. . . .")

No different conclusion is required by *Rose* v. *Mitchell,* 443 U.S. 545 (1979), a case mentioned by the majority below. In that case, this Court held that the Constitution does not permit a conviction to stand if it is obtained following indictment by a grand jury which was selected in a racially discriminatory way, even if the accused was not prejudiced

because he was subsequently convicted by a properly constituted petit jury. The Court explained its deviation from the usual prejudice rule by stating that racial discrimination at any stage of the criminal justice system is "odious in all respects, is especially pernicious in the administration of justice . . . [and] thereby casts doubt on the integrity of the judicial process." *Id.* at 555-6. *See also Peters* v. *Kiff*, 407 U.S. 493, 506-07 (1972) (White, J., concurring). Here, there is, of course, no claim of racial discrimination.

More to the point is *United States* v. *Morrison, supra.* In *Morrison,* this Court reaffirmed the principle that serious error, even one rising to the level of a violation of the constitutional right to counsel, does not require interference with a criminal proceeding unless the accused was prejudiced by the error. In the opinion for the Court, Mr. Justice White assumed that the drug enforcement agents in that case intruded upon the defendant's sixth amendment right to the assistance of counsel, but emphasized that there was "no prejudice of any kind . . . to the ability of her counsel to provide adequate representation . . . ." —— U.S. at ——, 101 S. Ct. at 669. Thus, concluded the Court, the indictment should not have been dismissed.

It makes no difference that *Morrison* involved review of the dismissal of an indictment rather than a remand for a new trial. As Mr. Justice White wrote "[t]he Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals" (*id.*). This language makes clear that, even in a federal prosecution, absent actual demonstrable prejudice, interference with the sixth amendment right to the effective assistance of counsel provides no justification for a new trial. *See also Weatherford* v. *Bursey,* 429 U.S. 545, 552, 558 (1977). Surely, the same

result is called for in a state prosecution when a prosecutor's failure to disclose is shown not to have prejudiced an accused's sixth amendment right to an impartial jury. That there was no such prejudice is demonstrated by the factual findings of the state judge.

(2) The state judge's finding that the juror was not biased is presumed correct, and is fully supported by the record.

In determining whether juror Smith, by seeking a position with the prosecuting agency, had become partial, the state trial judge, Justice Birns, conducted a post-verdict hearing as required by state law. *See* N.Y. Crim. Proc. Law §§330.30(2), 330.40(2)(f); *People* v. *Ciaccio*, 47 N.Y. 2d 431, 437, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 374 (1979). As noted, this is precisely the procedure required by this Court in the *Remmer* case.

Moreover, Justice Birns showed particular sensitivity to the Constitution by requiring proof, and being satisfied, beyond a reasonable doubt that juror Smith had not been biased (App. E at 57a). In imposing such a heavy burden of proof, the state judge refused to follow a state statute which would have required respondent Phillips to establish by a preponderance of the evidence that the pending letter had in fact biased the juror in favor of conviction. *See* N.Y. Crim. Proc. Law §330.40(2)(g).

Phillips was vigorously represented by trial counsel at what can only be described as a full, fair and adequate hearing. Accordingly, under 28 U.S.C. §2254(d), Justice Birns' resolution of the factual issue involving Smith's alleged bias is presumed correct. As this Court recently observed:

> Federal habeas has been a source of friction between state and federal courts and Congress obviously meant

> to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Corpus Act of 1867 .... [I]t is clear that in adopting the 1966 amendments, Congress in §2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of the seven conditions specifically set forth in §2254(d) was found to exist by the federal habeas court. *Sumner* v. *Mata*, —— U.S. at ——, 101 S. Ct. at 770-71, *supra*.

Despite the 2254(d) presumption, the circuit majority, without pointing to any statutory exception to the presumption, was willing only to "assume for purposes of argument that the trial judge might find after a hearing that the juror was of so staunch a character and such extraordinary sensitivity and righteousness that his judgment would not be affected, even subconsciously, by his interest in his future employment" (App. A at 10a). In light of the record, and the 2254(d) presumption, the majority's cavalier treatment of the state hearing was hardly warranted.

Reading the record, especially the voir dire of juror Smith and his testimony at the post-verdict hearing, it is impossible to conclude that Smith was influenced by the fact that he had sent a letter seeking future employment with the prosecution. To be sure, as found by Justice Birns, sending the letter was an indiscretion (App. E at 55a). Nonetheless, after extensive cross-examination, Smith impressed Justice Birns as an honest Vietnam veteran who had just graduated from Columbia University and who had "faith in his own integrity, [and] in his own ability to render a verdict on the evidence" (App. E at 49a). Moreover, Smith's nonverbal reaction to questions, the tone and inflection of his voice in his answers, and other aspects

of his demeanor were all probative on the issue of his bias during trial. Indeed, in the "determination of [a juror's] impartiality . . . demeanor plays such an important part . . ." (*Ristaino* v. *Ross*, 424 U.S. 589, 595 [1976]). Similarly, the state trial judge had also been in a position to observe Smith's reactions as the trial progressed. *See United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

In his brief to the Second Circuit, respondent Phillips argued that "given human nature," juror Smith must have been "guided in his deliberations by reasons of paramount self-interest" (Second Circuit Brief for Respondent: 9). However, thoughtlessness and naivete are as much the products of human nature as acting in one's own interest, and the record here clearly supports the finding that Smith was not guided by self-interest in his deliberations. Notably, Smith recognized his naivete in the matter and did not seek to justify sending the letter (Smith: H 725).

Throughout the questioning, Smith answered candidly and each answer demonstrated further his impartiality. For example, when defense counsel suggested that the possibility of a job led Smith to influence other jurors, Smith stated indignantly, "[t]o imply that I worked the jury's mind is repugnant to me and to the other jurors" (Smith: H 747). Again, in direct response to a defense challenge to his integrity, Smith responded, "I swore an oath to listen to the evidence and to render a verdict on the evidence. I did did so" (Smith: H 747). Similarly, in response to defense counsel's repeated questions as to whether he had any hope for the job if he voted to acquit, Smith replied, "I didn't thing about whether or not to acquit or convict Phillips had anything to do with the job. I didn't think about it at all, one way or the other" (*id.* at H 748-49).

Also relevant to show Smith's impartiality were the candid answers during voir dire in which Smith revealed his interest, participation and career goals in law enforcement. He had worked as a security guard at Bloomingdale's, had made arrests in this capacity, and had then cooperated with the New York County District Attorney's Office. He also was friendly with at least one former legal aid attorney, the man, in fact, who had recommended that he apply to the prosecutor's office. As Smith testified at the hearing, he knew that the prosecutor's office was a very large organization and that the assistant district attorney who would process his application would have nothing to do with the Phillips trial (Smith: H 725, 747). Thus, in light of Smith's educational and employment background, it is difficult to conclude that he believed for a moment that a conviction would enhance, in any way, his employment prospects.

During trial and after the verdict, Smith never mentioned his status as a juror in his application, never communicated with and was never contacted by the prosecutors, and had no reason to think they even knew of his interest in the position. Thus, Smith neither suggested to anyone in the District Attorney's Office that he would vote for conviction if his application were accepted, nor did he have any reason to believe that this, though not stated, was understood. True, Smith's friend Fontane sought to move Smith's application along by speaking to employees of the District Attorney. Nonetheless, as the district court stated, "Smith was apparently unaware of such efforts and had not requested they be undertaken" (App. B at 25a).

Notably, there is no suggestion in the record that Smith even once suggested to friends that his jury vote was in any way related to his application. Indeed, after the verdict,

when asked by his attorney friend who had recommended that he apply to the District Attorney, all Smith said was that he and the jury voted for conviction because of the overwhelming evidence of guilt after a period of deliberations which "wasn't very long" (Smith: H 764). Not once did he tell his friend, or anyone in the District Attorney's Office, that he had ever entertained the slightest hope that his position as a juror would gain him some leverage in his attempt to obtain a position. Indeed, as he testified, the job application had nothing to do with his duty as a juror and he did not think that the District Attorney would care about his actions as a juror (Smith: H 750). All of this demonstrated that Smith believed that there was no connection between his serving on the jury and the job application.

That he saw no connection is further shown by the fact that the day after the verdict, he telephoned the assistant district attorney to whom he had sent the application to ask about its progress; but even then he did not mention that he had been a juror in this case. Smith later asked his attorney friend to inquire about the application, and when Smith learned that only more experienced investigators would be hired, he simply abandoned hopes of obtaining the position, without ever mentioning his jury service.

Both the court below (App. A at 7a) and respondent at page 5 of his brief in opposition to certiorari questioned whether the juror's denials at the hearing were an adequate foundation upon which to base a finding of impartiality. Of course, this overlooks the state judge's extensive opportunities to observe Smith's demeanor, throughout the trial and, in particular, during his testimony at the hearing. Moreover, the conclusion of impartiality is based on more

than the juror's denials at the hearing and his demeanor. Rather, the conclusion of impartiality is also based upon evidence of what Smith did and did not do during and after trial, which demonstrated fully that he saw no connection between jury service and the job application and thus could not have been influenced by any connection. That he believed that there was no connection was confirmed by all his friends and acquaintances as well as the prosecutors who testified.

In sum, Justice Birns had every reason to conclude that Smith appreciated fully the meaning of his oath and that his duty as a juror could in no way be compromised by his pending application. This presumptively correct conclusion was credited by the district court. Notwithstanding the circuit court's cavalier treatment, the state judge's conclusion is supported eloquently, persuasively and fully by the record.

Of course, the state judge's finding of impartiality, indeed the entire hearing, would be irrelevant if, as the district court held, the law created an irrebuttable presumption of bias from the letter itself. Here too, error was committed.

(3) The Constitution requires challenges only to jurors who are determined to be actually biased.

Unlike the circuit court, the district court did not focus on the issue of prosecutorial misconduct. Instead, according to the district court, notwithstanding Smith's impartiality, the hypothetical reasonable man after applying for a job with the prosecutor would have been influenced by a belief (one not held by Smith) that unless he voted for conviction, he would not be considered for the position. Thus, the district court held that juror Smith's letter gave rise to an irrebuttable presumption of bias.

The district court seems to have overlooked the fact that the issue here involves a sitting juror who, during trial, sent a letter applying for a position with the prosecutor's office. The court analyzed the issue as if it arose during jury selection. Curiously, the district court referred to but one case dealing with juror misconduct during trial, a case which states that communications between jurors and non-jurors at most raise only a rebuttable presumption of prejudice. *Mattox* v. *United States*, 146 U.S. 140, 150 (1892). As demonstrated earlier, in the context of a sitting juror's alleged misconduct, the Constitution requires that the verdict be vacated only if the juror's actions demonstrate that he was actually biased (*see* cases cited in text at p. 26, *supra* and in note 8, at p. 25, *supra*). A presumption, if one is applicable at all, is merely a rebuttable one; thus the district court erred.

Indeed, the district court was wrong even if the issue is analyzed in the context of jury selection. The district court was wrong, because during jury selection the Constitution requires only that a criminal defendant be afforded an opportunity to challenge potential jurors who are actually biased. *See Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *United States* v. *Wood*, 299 U.S. 123, 146, 150 (1936).

True, as recognized by the district court, the right to an impartial jury is at the very heart of due process. *See Irvin* v. *Dowd*, 366 U.S. at 721-22. Thus, the Constitution prohibits systematic procedures which produce conviction-prone juries. *See Fay* v. *New York*, 332 U.S. 261, 294 (1947); *Henson* v. *Wyrick*, 634 F.2d 1080, 1083-85 (8th Cir. 1980, *cert. denied*, —— U.S. ——, 101 S. Ct. 1417 (1981). In addition, a jury must represent a fair cross-section of the community, and jury selection procedures based upon racial or other invidious criteria are invalid. *See, e.g., Peters* v. *Kiff*, 407 U.S. 493, 497-8 (1972); *Avery* v. *Georgia*,

345 U.S. 559, 561 (1953); *Taylor* v. *Louisiana*, 419 U.S. 522, 533 (1975). However, within these limitations and assuming a fair and meaningful opportunity to show actual bias (*see Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973), the process through which individual jurors are selected, *e.g.*, peremptory challenges or challenges for cause, is not prescribed by constitutional mandate and may vary from state to state. *See Swain* v. *Alabama*, 380 U.S. 202, 219-21 (1965); *Fay* v. *New York*, 332 U.S. at 294, *supra; United States* v. *Wood*, 299 U.S. at 146, *supra; Stilson* v. *United States*, 250 U.S. 583, 586 (1919).

For example, many states have statutes which set forth certain conduct or status which automatically disqualifies a person from sitting on a particular jury, regardless of whether that person is actually biased. [12] This is known as exclusion for implied bias. Thus, virtually all states by statute exclude those persons related within a certain degree of consanguinity to the prosecution or defense counsel, a witness, or the defendant.[13]

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12. *See* Cal. Penal Code §1074 (West); Idaho Code Crim. Proc. §19-2020; Minn. Stat. Ann. R. Crim. P. 26.02(5) (West); N.Y. Crim. Proc. Law §270.20(1); N.D. Cent. Code §29-17-36; Okla. Stat. Ann. title 22 §660 (West); Ore. Rev. Stat. §136.220; S.D. Codified Laws Ann. §23A-20-13; Utah Code Ann. §77-35-18(e).

13. *See, e.g.*, statutes cited in note 12, *supra*. New York goes further than most states or any constitutional requirement and by statute disqualifies at the time of jury selection any person who has a relationship to a party or witness to the action which is likely to preclude that person from rendering an impartial verdict. N.Y. Crim. Proc. Law §270.20(1)(c). This provision, added to the statute in 1971, calls for the application of a reasonable man standard and does not focus on the impartiality of the particular potential juror. *See, e.g., People* v. *Provenzano*, 50 N.Y.2d 420, 424, 407 N.E.2d 408, 410, 429 N.Y.S.2d 562, 563 (1980); *People* v. *Branch*, 46 N.Y.2d 645, 650-51, 389 N.E.2d 467, 468-69, 415 N.Y.S. 2d 985, 987 (1979). Notably, the New York Court of Appeals has held, as have the courts of most states, that it is the province of the legislature to create, or remove, particular grounds for challenge for "implied bias" and that no challenge on a particular ground lies absent such statutory provision. *See People* v. *McQuade*, 110 N.Y. 284, 300-01, 18 N.E. 156, 164 (1888); *see also People* v. *Stokes*, 53 N.Y. 164, 173 (1873), *quoted with approval* in *United States* v. *Wood*, 299 U.S. at 146, *supra*.

Noteworthy is that the courts of most states have historically held that no challenges for "implied bias" exist in their common law; hence, the only grounds permitted for imputing "implied bias" are those specifically enumerated by statute.[14] By contrast, some states permit no challenges on the ground of "implied bias" but look only to whether jurors can in fact be impartial.[15] On the other hand, in the federal jurisdiction, and some of the states, there are challenges for implied bias, which are not governed by a detailed court rule or statute but have been addressed on a case-by-case basis.[16]

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14. *See, e.g., People* v. *Wilkes,* 44 Cal. 2d 679, 685, 284 P.2d 481, 485 (1955); *State* v. *Scoble,* 28 Idaho 721, 723, 155 P. 969, 970 (1916); *Sorseleil* v. *Red Lake Falls Milling Co.,* 111 Minn. 275, 277, 126 N.W. 903, 904 (1910); *People* v. *McQuade,* 110 N.Y. at 300-01, 18 N.E. at 164, *supra; State* v. *Morse,* 35 S.D. 18, 27, 150 N.W. 293, 297 (1914); *Petcosky* v. *Bowman,* 197 Va. 240, 254, 89 S.E.2d 4, 14 (1955); *Redwine* v. *Fitzhugh,* 78 Wyo. 407, 421, 329 P.2d 257, 261 (1958). *See generally,* Anno., *Professional or Business Relations Between Proposed Juror and Attorney as Ground for Challenge for Cause,* 72 ALR2d 673, §2, pp. 674-75, §4, pp. 676-79, §6, pp. 680-81 (1958). *See also* statutes cited in note 12, *supra.*

15. *See, e.g.,* Del. Code Ann. title 11, §3301; Del. Sup. Ct. Crim. Rules, Rule 24(a); *Parson* v. *State,* 275 A.2d 777, 783 (Del. 1971); Ky. Rules Crim. Proc., Rule 9.36; *Hemphill* v. *Commonwealth,* 405 S.W.2d 956, 958 (Ky. 1965).

16. *See* 28 U.S.C. §1870; *Leonard* v. *United States,* 378 U.S. 544 (1964); *Haussener* v. *United States,* 4 F.2d 884, 886 (8th Cir. 1925); *compare United States* v. *Brown,* —— F.2d —— (2d Cir. March 16, 1981), *with United States* v. *Allsup,* 566 F.2d 68, 71-72 (9th Cir. 1977); Conn. Gen. Stat. Ann. §54-82(f) (West); *State* v. *Kokoszka,* 123 Conn. 161, 163, 193 A. 210, 211 (1937); N.H. Rev. Stat. Ann. §§606:1-4; *State* v. *Howard,* 17 N.H. 171 (1845), *overruled on other grounds, Shulinsky* v. *Boston & M. R.R.,* 83 N.H. 86, 89, 139 A. 189, 191 (1927); W. Va. Code §62-3-4; *State* v. *West,* 157 W.Va. 209, 219, 200 S.E.2d 859, 865 (1973).

In *United States* v. *Burr,* 25 Fed Cas. 49, 50 (C. C. Va. 1807), Chief Justice Marshall wrote that a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice because, in general, persons in a particular situation would feel prejudice." Interestingly, in *Burr,* the juror in question was excluded after stating that he had a preconceived opinion that Burr had the intent to commit treason, the crime charged. This preconceived opinion, of course, demonstrated actual rather than implied bias.

Recognizing this diversity of approach, the Court, in *United States* v. *Wood,* 299 U.S. at 146, *supra,* declared that, although the sixth amendment guarantees the right to an impartial jury,

> the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common law rules.

The decision in *Wood* upheld a statute designed to nullify a prior decision, *Crawford* v. *United States,* 212 U.S. 183 (1909), which held that governmental employees could not sit as jurors in criminal prosecutions in the District of Columbia. This Court concluded that even if all governmental employees were excludable at common law for "implied bias" (a supposition which the Court disputed), and, moreover, even if employees of the prosecuting agency itself were excludable at common law for "implied bias," the Constitution does not require the automatic exclusion of such persons. The Court explained, "[w]e think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation." 299 U.S. at 149.

This Court in *Wood* realized that isolated instances would occur in which the trial court would encounter the possibility of actual partiality. The Court stated, "we

must assume that the [trial] courts . . . , with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused." 299 U.S. at 150. Thus, the Court, rather than precluding, "without any rational foundation," entire categories of jurors from serving (*id.* at 149) properly charged the trial courts with determining whether individual jurors were, in fact, partial. *See also Dennis* v. *United States,* 339 U.S. 162, 168 (1950); *Frazier* v. *United States,* 335 U.S. 497, 511 (1948).[17]

Thus, even if the issue here arose in a jury selection context, exclusion for implied bias would not be required by the Constitution. Further, the reason that courts generally do not favor non-statutory irrebuttable presumptions of bias even before trial is well demonstrated by this case. The district court judge looked only to the fact of the job application and concluded that the hypothetical average man would have been influenced by a belief that if he voted for acquittal, he would have no chance for the position. Yet, here the application by itself did not mean that Smith had had a direct substantial economic dependence on the

17. Notably, the Second Circuit, even as recently as last March, has expressly refused in federal prosecutions to "create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where . . . there is no showing of actual bias or prejudice." *United States* v. *Brown,* —— F.2d at ——, *supra,* note 16, quoting *Mikus* v. *United States,* 433 F.2d 719, 724 (2d Cir. 1970); *accord, United States* v. *Johnson,* 401 F.2d 746, 747 (2d Cir. 1968).

New York County District Attorney's Office.[18] To stop the inquiry at the fact of the application, as did Judge Pierce in applying a conclusive presumption, makes little sense, especially since an examination of the other facts developed at the post-trial hearing leads inexorably to the conclusion that by merely writing a letter expressing interest in a job, Smith had not become a biased juror (*see* pp. 34-39, *supra*).

Of course, if it had been shown that Smith believed that he would receive a direct benefit from a conviction then a different case would have been presented. This is the teaching of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), referred to by both the circuit and district courts. In that case the village mayor, who served as a justice of the peace, had a direct and substantial pecuniary interest in convicting de-

---

18. Some state courts have applied conclusive presumptions when there is a direct substantial economic dependence upon one of the lawyers or parties. *Compare Loayza* v. *Brooklyn & Queens Transit Corp.*, 254 App. Div. 577, 578, 2 N.Y.S.2d 894, 895 (2d Dept. 1938) (juror impliedly biased because wife had similar civil action pending against same defendant in same court) and *Turner* v. *Montgomery Ward & Co.*, 165 S. Car. 253, 258-59, 163 S.E. 796, 797-98 (1932) (two jurors properly discharged on voir dire where they said they worked for defense counsel and had an interest in seeing their employer win the case) and *Block* v. *State*, 100 Ind. 357, 364 (1885) (juror, a deputy of the district attorney trying the case, was impliedly biased) *with C.A. Rees & Co.* v. *Road Improvement Dist. No. 1*, 167 Ark. 383, 387, 267 S.W. 770, 771 (1925) (juror not impliedly biased because he was a business associate of defendant's lawyer and also one of the commissioners of the defendant governmental agency) and *People* v. *Wilkes*, 44 Cal. 2d at 685, 284 P. 2d at 485, *supra* (two jurors were not impliedly biased even though they had as their personal counsel a deputy district attorney and the district attorney trying the case) and *Sorsoleil* v. *Red Lake Falls Milling Co.*, 111 Minn. at 277, 126 N.W. at 904, *supra* (no implied bias merely because juror was client of attorney trying the case), and *Redwine* v. *Fitzhugh*, 78 Wyo. at 421, 329 P.2d at 261, *supra* (same) and *McGeever* v. *State*, 239 Wis. 87, 96-97, 300 N.W. 485, 489 (1941) (no implied bias of a juror who was a part time dance hall inspector employed under the supervision of the district attorney), and *Klinck* v. *State*, 203 Ind. 647, 651-52, 179 N.E. 549, 551 (1932) (no implied bias even though trial prosecutor was executor of an estate of which juror and his wife were beneficiaries). *See generally* Anno., 72 ALR2d 673, *supra* note 14.

fendants because the only source of payment for his judicial services was fines imposed after convictions. In this extreme setting the Court observed that:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law (*id.* at 532); *see also Connally* v. *Georgia*, 429 U.S. 245, 247-49 (1977).

As the above quotation makes clear, *Tumey*, as distinguished from the instant case, involved a systematic procedure which assured that the trial judge knew he would benefit personally from a conviction. *Accord, Connally* v. *Georgia, supra.* As this Court emphasized in *Tumey*, each accused appearing before this judge was compelled "to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him . . ." (*id.* at 523). In view of this interest, the prosecution could not realistically have met its burden of showing that the judge was actually unbiased.

Similarly, it is impossible to show the absence of juror bias where racial and other systematic exclusions result in juries not fairly representative of a cross-section of the community. As recognized in the plurality opinion by Mr. Justice Marshall in *Peters* v. *Kiff*, 407 U.S. 493, *supra*, in such situations, in which there is an "appearance of bias," prejudice is automatically assumed because the exclusion of a segment of the community can deprive the jury of "a perspective on human events that may have unsuspected importance in any case that may be presented" (*id.* at 503-04, *supra*); and there is no way in a particular

case to determine whether the absence of such a perspective affected the verdict. Where, however, the impartiality of an individual juror is questioned, the presence or absence of bias can be determined readily. In this case, as found by the state judge, Smith's application for employment on its face did not demonstrate that Smith would, in fact, receive a benefit upon conviction, nor did it show that Smith believed he would receive such a benefit. App. E at 51a; *cf. United States ex rel. Moore* v. *Fay*, 238 F. Supp. 1005, 1007 (S.D.N.Y. 1965) (Weinfeld, J.). Put simply, the interest, if any, of juror Smith was much more remote than that of the judge in *Tumey*, and whether or not Smith was actually biased could have been, indeed was, determined at a hearing.

Moreover, *Tumey* involved a judge's bias, while this case involves alleged juror bias. True, the Constitution requires that both judges and jurors be impartial. However, once judicial bias is alleged, the allegation is not examined in detail by an impartial arbiter. Rather, the judge himself generally decides whether or not he should preside. *See, e.g.*, 28 U.S.C. §455. A hearing to determine a judge's state of mind would be particularly unseemly both because of a judge's stature and position in the criminal justice system and because the arbiter of his impartiality would be a colleague. Thus, the mere appearance of partiality on the part of a judge requires recusal. On the other hand, the impartiality of a juror is reviewable by a neutral judge. Accordingly, the actual bias standard for jurors is not only constitutionally sufficient, but easily implemented.

In sum, the district court erred in concluding that the Constitution required a challenge for implied bias in this case, a conclusion which is especially erroneous because implied bias challenges apply, if at all, only during jury

selection. Here, the alleged bias came into existence during trial and the Constitution requires the removal of sitting jurors only upon a showing of actual bias, which was not present in this case.

• • •

Returning briefly to the decision below, at the core of the Second Circuit's departure from accepted principles is its incorrect insistence that the crucial issue in this case was prosecutorial misconduct. From this false premise the majority seems to have concluded that even if the juror was actually impartial the prosecutor's failure to disclose the job application by itself deprived the accused of due process (App. A at 10a). However, because juror Smith was found to be actually unbiased after a full, fair and adequate hearing, Phillips has been convicted by twelve impartial jurors. The Constitution requires no more.

To be sure, the trial prosecutor was wrong in failing to disclose the juror's letter. Nonetheless, that wrongful conduct did not prejudice Phillips and it makes poor sense and worse law to punish the people of New York State by requiring a new trial, twelve years after the crime (with all of the attendant problems), for a corrupt police officer who was convicted of two murders on overwhelming proof of guilt by twelve jurors, not one of whom has been found to be anything but impartial. By seeking reversal, we seek no vindication for the trial prosecutor. Rather, we seek vindication of the accepted legal principles from which the courts below so clearly departed, thereby unjustifiably interfering in a most significant state criminal prosecution.

Conclusion

The judgment appealed from should be reversed.

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May 22, 1981

APPENDIX

This appendix contains only the statutory and constitutional provisions involved. References in the brief to lettered appendices (*e.g.*, App. A-G) are to the appendix to the petition for certiorari.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 U.S.C. §2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254(d) of the United States Code provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> * * *
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

• • •

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

• • •

Former section 270.35 (amended L. 1975, c. 77, §1) of the New York Criminal Procedure Law provided:

• • •

2. If at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case, or that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 280.10, the court may, if an alternate juror or jurors are available for service, discharge such trial juror and order that he be replaced by the alternate juror whose name was first drawn and called. If no alternate juror is available, such trial juror may not be discharged, and the trial must proceed.

Section 280.10 of the New York Criminal Procedure Law provides, in pertinent part:

> At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:
>
> 1. Upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial. . . .

Section 330.30 of the New York Criminal Procedure Law provides, in pertinent part:

> At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
>
> * * *
>
> 2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; . . . .

Section 330.40 of the New York Criminal Procedure Law provides, in pertinent part:

> * * *
>
> 2. A motion to set aside a verdict based upon a ground specified in subdivisions two and three of section 330.30 must be made and determined as follows:
>
> (a) The motion must be in writing and upon reasonable notice to the people. The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support

the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief;

(b) The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers;

(c) After all papers of both parties have been filed, the court must consider the same and, if the motion is determinable pursuant to paragraphs (d) or (e), must or may, as therein provided, determine the motion without holding a hearing to resolve questions of fact;

(d) The court must grant the motion if:

(i) The moving papers allege a ground constituting legal basis for the motion; and

(ii) Such papers contain sworn allegations of all facts essential to support such ground; and

(iii) All the essential facts are conceded by the people to be true.

(e) The court may deny the motion if:

(i) The moving papers do not allege any ground constituting legal basis for the motion; or

(ii) The moving papers do not contain sworn allegations of all facts essential to support the motion.

(f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;

(g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

Rule 24(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

Office - Supreme Court, U.S.
FILED
NOV 3 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF ON THE MERITS FOR PETITIONER

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SUPPLEMENTAL BRIEF ON THE MERITS FOR PETITIONER

Respondent discovered the decision in *McCoy* v *Goldston,* 652 F.2d 654 (6th Cir. 1981), on August 24, 1981, and nine weeks later he has filed a supplemental brief arguing that the *Goldston* case has relevance here. Neither the tim-

ing of the brief (approximately one week before argument)[1] nor the case itself furthers respondent's position. Indeed, *McCoy* v. *Goldston* supports fully our argument that the state courts followed the constitutionally appropriate procedure (Brief for Petitioner: 23-34; Reply Brief for Petitioner: 6-11) and that the federal courts erred in granting habeas corpus relief.

Argument

The *Goldston* case, *supra,* was a civil rights action in which plaintiffs sued individual Detroit police officers, as well as the city police department itself. After a verdict was returned against plaintiffs, it was discovered that on voir dire a juror had failed to disclose that her son was about to complete a training program and become a parole officer. The juror failed to make this disclosure even though the trial judge asked prospective jurors whether ". . . any of you have any close friends or relatives who are connected or associated with any law enforcement agency or police department." 652 F.2d at 656.

Given the juror's failure to disclose this fact on voir dire, the Court of Appeals for the Sixth Circuit remanded the case to the district court for an evidentiary hearing at which the juror would testify. The circuit court directed that at

1. To be sure, Rule 35.5 of the Rules of this Court (not Rule 22.6 cited by respondent) permits the filing of a supplemental brief on the merits to bring new authority to the attention of the Court, no later than one week before argument. Still, it is difficult to believe that this rule is designed to permit the filing of a brief one week before argument when that brief is based upon a case discovered nine weeks prior to filing.

the conclusion of that hearing, the district court should order a new trial if: (1) the juror "deliberately concealed information or gave a purposefully incorrect answer;" or (2) "the juror admits a feeling of partiality;" or (3) "the judge makes a pragmatic judgment that there is a substantial possibility of the juror unconsciously favoring one side or another." 652 F.2d at 659.

Despite respondent's reliance on *Goldston*, that case clearly and unequivocally supports our position that here the post trial procedures in state court were constitutionally appropriate. The state trial judge held the very kind of evidentiary hearing ordered in *Goldston*. At the conclusion of that hearing, the state judge determined that: (1) juror Smith had not deliberately concealed his job application for a position with the District Attorney's Office; (2) Smith had convincingly denied any feeling of partiality; and (3) there was no substantial possibility that the job application affected Smith consciously or subconsciously; indeed, the state judge was satisfied beyond a reasonable doubt that Smith was impartial.[2]

---

2. At pages 2-3 of the Supplemental Brief, respondent argues that because the juror sent a letter and resume to the prosecutor, he must be conclusively presumed biased under the doctrine of implied bias established by *United States* v. *Wood*, 299 U. S. 123 (1936). But, as we have shown previously (Brief for Petitioner, pp. 43-44; Reply Brief for Petitioner, pp. 12-13), *Wood* stands for the opposite proposition: the Constitution requires no challenge for cause based upon a conclusive presumption of bias merely because of a potential juror's employment by the government even if he or she is employed by an agency having a special interest in the case. 299 U. S. at 149-50. Rather, *Wood* holds that the Constitution requires only challenges for cause based upon a showing of actual bias. *Id.* The *Wood* decision has clearly demarked the governing constitutional principle for forty-five years, and respondent offers no reason to depart from that clear demarcation.

Notably, in discussing the *Goldston* case, respondent mentions only that the Sixth Circuit Court of Appeals reversed for "appropriate proceedings" (Supplemental Brief: 2), omitting to say that the appropriate proceeding ordered was a post trial evidentiary hearing. 652 F.2d at 657. By this omission, respondent seemingly recognizes that the ordering of a post trial hearing in *Goldston* is fatal to his claim that a similar state hearing was constitutionally inadequate. Avoiding the Sixth Circuit's recognition of a post trial hearing's efficacy, respondent argues that the prosecutor deliberately concealed the juror's letter and resume and that this failure requires a new trial under the rationale of *Goldston.*

The Sixth Circuit wrote that if, after the evidentiary hearing, it was found that the juror deliberately failed to disclose at voir dire, such a finding would require a new trial. 652 F.2d at 659. Certainly, if a juror lies about a fact and that lie is made for the very purpose of avoiding a peremptory challenge, then it seems fair to infer that that juror has a state of mind which precludes her or him from being fair and impartial. Of course, here the trial judge found that juror Smith neither lied at voir dire, nor deliberately concealed sending the letter and resume to the District Attorney's Office during trial. Notably, in the Supplemental Brief, respondent does not challenge these findings. Rather, as noted above, he tries to equate the prosecutor's "deliberate concealment" at trial with the *Goldston* juror's "deliberate concealment."

In the first place, the state judge found that there was no deliberate concealment, *i.e.*, no effort to secure an unfair advantage, on the part of the prosecutor. Appendix E to

Petition for Certiorari: 39a-40a; *see* Reply Brief for Petitioner: 5. In the second place, and perhaps more importantly, a potential juror who deliberately conceals relevant information may well demonstrate his or her unfitness to serve as a juror. In contrast, while a prosecutor who deliberately conceals the same facts may demonstrate his or her unfitness, surely the prosecutor's failure to disclose does not demonstrate the juror's unfitness. Put simply, the prosecutor's failure to disclose the juror's letter did not prejudice respondent because a post trial hearing like the one ordered in *Goldston* was still available to determine whether juror Smith was biased.

Relying on *Goldston,* respondent attempts to create prejudice by again arguing that if the prosecutor had disclosed the juror's application during trial, the state judge "would undoubtedly have" replaced that juror with an alternate then available. Supplemental Brief: 3.[3] Respondent then argues that the prosecutor's failure to disclose made replacement impossible and that a new trial is the only satisfactory remedy. This argument, based as it is on *Goldston,* is fatally flawed because in *Goldston* the juror's failure to disclose during voir dire prevented plaintiff from exercising a peremptory challenge. Still, the Sixth Circuit ordered an evidentiary hearing, not a new trial.

If that hearing was adequate in *Goldston* to protect the right to an impartial jury, then it must also be adequate here, unless a different result is necessary to punish the

3. This speculation about what the state trial judge would have done is in conflict with that judge's thoughts in this regard. Appendix E to Petition for Certiorari: 56a (opinion of trial judge).

state prosecutor for a "serious," "unique misjudgment." Appendix E to Petition for Certiorari: 52a, 57a (opinion of state trial judge). However, this Court has unequivocally held that, absent prejudice to an accused (and here the post trial hearing shows there is none), improper prosecutorial conduct is not a basis for interfering in a state criminal prosecution and granting federal habeas corpus relief. *See* Brief for Petitioner: 31-34 (authorities cited).

• • •

In sum, after a full, complete and fair hearing, the state judge found no bias or misconduct on the part of the juror. A similar finding in the *Goldston* case would end that federal case. Here, the state case should have been treated the same way.

Respectfully submitted,

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November 2, 1981

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

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—against—

WILLIAM R. PHILLIPS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR RESPONDENT

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Questions Presented

In a state criminal trial for double murder and related crimes, a juror, one John Dana Smith, therein, applied to the prosecutor for an investigative position shortly after he was sworn. During the trial, Smith's friends inquired about the status of his application and, in the process, informed the prosecutor's office that he was sitting on respondent's jury. When the trial assistants learned of the pending application, one week before respondent's conviction, they directed that no one in their office contact Smith and decided not to inform either the court or the defense about the situation. The day after the verdicts, Smith, who had heard nothing from the prosecutor's office since the filing of his application, attempted unsuccessfully to ascertain its status from one Joan Sudolnik, the Assistant District Attorney responsible for reviewing it, and then asked a former employer to intervene for him. The latter telephoned Ms. Sudolnik and, among other things, informed her that Smith had been a juror at respondent's trial. Ms. Sudolnik replied that Smith would be interviewed for the position, along with other applicants, but that the final decision would be made by another city agency. On December 9, 1974, five days after learning of the above facts, the District Attorney finally informed the trial judge thereof.

1. Is a person in Smith's position, although found not to be actually biased by the trial court, conclusively presumed to be impliedly biased and, therefore, disqualified as a trial juror?

   The United States District Court for the Southern District of New York answered this question in the affirmative.

2. Is the failure of the prosecutor to inform the trial court and the defense of the juror's application and the history thereof in time for the latter's re-

placement by an available alternate such a violation of due process as to require a new trial?

The District Court did not reach this question, but the United States Court of Appeals for the Second Circuit answered it in the affirmative.

3. Is the failure of the prosecutor to inform the trial court and the defense of the juror's application and the history thereof prior to the commencement of jury deliberation such egregious prosecutorial misconduct as to require a new trial, irrespective of demonstrable prejudice to respondent?

Neither the Circuit not the District Court reached this question.

Parties to the Proceedings

The parties to the proceeding are as follows:

1. Harold J. Smith, Superintendent Attica Correctional Facility, is the nominal petitioner.
2. William R. Phillips, a former inmate at said Attica Correctional Facility, is the respondent.

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Preliminary Statement

This brief is submitted in response to that of Petitioner. Respondent's time in which to file and serve this Brief was extended by the Clerk of this Court from June 21, 1981, to August 3, 1981, by letter dated June 16, 1981.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the grant of habeas corpus (App. A, 1a-12a)* is reported at 632 F.2d 1019 (1980). The opinion of the United States District Court for the Southern District of New York granting the writ of habeas corpus (App. B, 13a-29a) is reported at 485 F. Supp. 1365 (1980). The opinion of the state trial judge denying the motion to set aside the conviction (App. E, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S.2d 906 (1975). The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of former Chief Judge Charles Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d, 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, 58a-59a). Rehearing was

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* The parties have agreed that Appendices A through G to the petition for certiorari should constitute the Joint Appendix, and on April 20, 1981, the Court granted the State's motion to dispense with printing the appendix. References, therefore, are to the appendices to the petition for certiorari except as to Respondent's Appendices H through M which are appended hereto. All references to any appendices shall be indicated by its letter, followed by the appropriate pagination.

denied on December 8, 1980, (App. G, 60a-61a), and it was noted that no judge in regular active service nor on the panel which heard the appeal had requested that a vote be taken on petitioner's suggestion for rehearing *en banc. Id.* The petition for a writ of certiorari was filed on January 1, 1981, and this Court granted said petition on February 23, 1981. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in addition to those contained in the Appendix to Petitioner's Brief, are set forth in Appendix H hereto.

Counter-Statement Of The Case

While respondent has no fault to find, in general, with Petitioner's Statement of the Case, there are several omissions or misstatements which deserve mention. For example, petitioner points out on Page 3 of his Brief that Respondent's first trial ended in a hung jury without revealing that the panel had been deadlocked 10-2 for acquittal. See Appendices I and J hereto. It might also be pointed out that the "recognition" of respondent when he appeared as a cooperating witness at the televised hearings into police corruption conducted by the New York City Knapp Commission in 1971 by John Justy, a city detective assigned to investigate the crimes here involved, Petitioner's Brief at 3, was, not only by its fortuitious nature, suspect,* but evidence at the trial certainly augmented that impression. Detective Justy claimed that, when he saw Respondent on television, he "realized that [Respondent] resembled the composite

* It might be noted that respondent's indictment and eventual conviction aborted a substantial number of state and federal indictments which resulted or would have resulted from his testimony. App. K at 7a.

sketch of the killer which had been obtained from the eye witnesses." Petitioner's Brief at 3. Yet when the only survivor of the shootings testified, he admitted that he had misidentified Respondent, and that he had never been shown the composite sketch in question until December 14, 1971. Trial Transcript at 654, 668.

However, it serves no useful purpose to go through petitioner's factual presentation and point out each and every inaccuracy or misstatement. The essential facts, as set forth by the District Court, and which are not in significant dispute, are as follows:

1. On September 23, 1974, the day he was selected and sworn as a juror in respondent's trial, Mr. Smith learned from one Rudy Fontaine, a Criminal Court officer, that there were job opportunities for people with investigative backgrounds in the Major Felony Program of the New York County District Attorney's Office. App. A, at 16a.

2. After Mr. Smith had expressed interest in such a position, Officer Fontaine then inquired of a friend, an investigator in the District Attorney's Office, as to the proper procedures for applying therefor. *Id.*

3. Although the record is inconclusive as to whether Officer Fontaine mentioned Juror Smith's name to anyone in the District Attorney's Office, he did furnish the information as to the proper procedures to Mr. Smith. *Id.*

4. Officer Fontaine also spoke to one Mario Piazza, a jury warden for the New York State Supreme Court, to inquire as to where such employment applications should be submitted. *Id.*

5. Warden Piazza then spoke to John Lang, an Assistant District Attorney, and was informed that applications should be sent to the District Attor-

ney's Office. *Ibid.*, 16a-17. Although Piazza did not mention Smith's name, he met the latter, while petitioner's trial was in progress, at a lunch which was also attended by Officer Fontaine. *Ibid.*, at 17a.

6. On or about October 22, 1974, Smith drafted an application letter and resume, pursuant to instructions received from Officer Fontaine, which was then hand-delivered by the latter to the District Attorney's Office, together with his own application. *Id.*

7. When the District Attorney's Office refused to accept Smith's hand-delivered application, Officer Fontaine, following the said office's instructions, then stamped and mailed the juror's application, addressed to then District Attorney Richard Kuh. *Ibid.*, at 17a-18.

8. Smith's application and resume were received by the District Attorney's Office on October 23, 1974. *Ibid.*, at 18a.

9. Several days later, after a meeting between Juror Smith, Officer Fontaine, and Warden Piazza, the latter informed Fontaine (and, presumably, Smith) that the juror's application had been submitted. *Id.*

10. Shortly afterward, Warden Piazza notified Officer Fontaine that Assistant District Attorney Joan Sudolnik was responsible for reviewing Smith's application and that the juror should call her.

11. Officer Fontaine apparently relayed this information to Juror Smith. *Id.*

12. Later, while petitioner's trial was still in progress, Officer Fontaine informally inquired as to the status of Juror Smith's application, informing an Assistant District Attorney Holmes that Smith was a juror at respondent's trial. *Id.*

13. In addition Warden Piazza also inquired on several occasions of Assistant District Attorneys Holmes and Lang about the position in quesiton and, according to Holmes, mentioned Smith's name in connection therewith. *Ibid.*, at 19a. Holmes apparently told Piazza that Smith's application could not be processed because he was on respondent's jury and advised him to have no contact with the juror. *Ibid.*, at 19a.

14. Shortly thereafter, Holmes notified Assistant District Attorney Sudolnik about the juror's application and that he was on respondent's jury. *Id.*

15. On or about November 14, 1974, one week before respondent's conviction, the trial prosecutors, Jack Litman and Philip La Penta, were informed of the situation and orders were apparently issued to assure them that Smith would not be contacted by anyone in the District Attorney's Office. *Id.*

16. After conferring together, Messrs. Litman and La Penta decided not to inform either the court or defense counsel about the Smith situation.

17. Respondent's jury retired to deliberate on November 20, 1974, and returned its guilty verdicts the next day. *Id.*

18. At no time prior to the aforesaid verdicts was Smith ever informed as to the status of his employment application. The day after the jury's verdicts he tried to contact Assistant District Attorney Sudolnik about his said application. *Id.*

19. Failing to reach her, he asked one Wallace Reilly, a former supervisor, to inquire at the District Attorney's Office as to the status of his application. *Ibid.*, at 20a-21a.

20. Reilly then called Sudolnik and, among other things, informed her that Smith had been a juror at respondent's trial. She replied that Smith

would be interviewed for the position, along with other applicants and that the final decision would then be made by the New York City Bureau of Personnel rather than the District Attorney's Office.

21. On December 9, 1974, District Attorney Kuh informed the court of the Smith application and some of the approaches to his personnel on the juror's behalf. *Id.*

Summary of Argument

Respondent's first trial for a double murder and an attempted murder ended in a mistrial because the jury reported itself hopelessly deadlocked, reportedly 10-2 for acquittal. At his second trial, which lasted nine weeks and involved forty-four witnesses, he was convicted of all the crimes of which he was accused by an all-male jury which had deliberated almost eleven hours over a two-day period. Eighteen days after the rendition of the above verdicts, the prosecutor revealed, for the first time, to the trial judge that, shortly after being sworn, one John Dana Smith, Juror No. 3, had applied to his office for an investigative position, caused inquiry to be made of his application's status during the course of the trial, and, the day following the verdicts, had called and caused to be called the Assistant District Attorney responsible for reviewing his application, to determine its status. At no time during this period, was the juror given any inkling by the prosecutor's office that his application was not under active and serious consideration by it.

It is respondent's contention that any juror in Mr. Smith's situation was, as the District Court held, "[N]ot qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors." App. B at 29a. Such an "inexcusable abridgement of

the [respondent's] Sixth Amendment right," *id.*, cannot be cured or neutralized by a post-conviction hearing in which the sole probative evidence as to the juror's state of mind consisted of his vehement and self-conscious denials of any bias in favor of the prosecutor. See Petitioner's Brief at pp. 12-13.

Throughout all recorded Anglo-American jurisprudence, jurors in Smith's position have been held to be disqualified as a matter of law. The reason, as pointed out by the court below, is that "[G]iven the human propensity, often subconscious, for self-justification, as well as the 'psychological impact' of requiring an individual to state before others whether he was fair and impartial . . . it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact impartial." App. A, at 7a.

Moreover, the inclusion of such a juror on respondent's jury, with the prosecution's knowledge and concealment thereof, is a gross violation of the 'appearance of justice' standard. It does not require a great deal of imagination to gauge accurately both the lay and professional reaction to the presence of a person in Smith's position on a jury in what petitioner himself characterizes as a "most significant state prosecution . . ." Petitioner's Brief at 19. If the 'appearance of justice' standard has any vitality whatsoever, this is a most classic case for its application.

Lastly, the deplorable conduct of the prosecutor in not making timely disclosure of Juror Smith's job application, while doing so in the case of another juror in a far less compromising position, calls for "the objective, prophylactic role," App. A at 7a, adopted by the District Court. Such prosecutorial misconduct, which was the catalyst for the necessarily ineffectual Remmer-type hearing conducted by the state trial judge, will continue to reign unchecked, as prophecized by former Chief Judge Swygert in his dissenting opinion in *United States* v.

Falk, 605 F.2d 1005, 1016 (7th Cir. 1979), unless the highest tribunal in the land asserts the constitutional impropriety of such malfeasance and takes firm and unequivocal action to deter or inhibit repetition.

ARGUMENT

I

Juror Smith's Application, Immediately Following His Selection, For A Position With The Prosecutor, Created An Irrebutable And Conclusive Presumption Of Bias.

A. Any Juror In Mr. Smith's Position Must Be Considered Impliedly Biased.

The fundamental issue raised by these proceedings is whether any trial juror, who immediately after his/her selection, applies to the prosecutor for a position, can ever be considered a fair juror, despite his/her post-trial protestations of impartiality, and the trial judge's acceptance, after an evidentiary hearing, of the claimed freedom from bias. It is respondent's contention that, given the within record, it is impossible as a matter of law, for such a juror to be impartial, and that the trial judge's finding of non-bias flies in the face of all logic, psychology and human experience. As the Second Circuit majority opinion put it:

> Given the human propensity, often subconscious, for self-justification, as well as the "psychological impact" of requiring an individual to state before others whether he was fair and impartial, *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact "impartial." Indeed, following a

> seven week trial any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect. App. A at 7a.

In the instant case, it would be virtually impossible to expect that any juror, in Mr. Smith's position, could possibly admit, if such were the case, that he had indeed been influenced by his pending job application. Such an admission would quite obviously subject him to severe sanctions, either through criminal prosecution or the contempt process, as well as destroy any chances he may ever have had to secure the employment he so assiduously sought as well as future such employment with other law enforcement agencies. Under such circumstances, to expect that any evidentiary hearing, no matter how conscientiously and thoroughly conducted, could possibly produce anything more than, as here, impassioned denials of bias or partiality, would be to belie or ignore all the lessons of human frailty.

Only recently, the Indiana Supreme Court, in *Haak* v. *State*, — Ind. —, 417 N.E. 2d 321 (S. Ct. Ind. 1981), held that a woman, whose husband was offered a position on the prosecutor's staff on the day that she was selected as a juror in a rape case, was impliedly biased. As that court put it:

> The juror's bias here could not be avoided or dissolved by admonitions from the court or by the juror's assertion that she believed she could judge this case impartially. To expect a juror in this situation to act with an even hand toward both parties, when she knows her spouse is soon to become an advocate for one of those parties, is to ignore human nature. In spite of his or her most sincere efforts to become or remain impartial, the juror in this situation would unquestionably be subjected to extraneous pressures; it is precisely

> these pressures and the unreasonable risks of these pressures which must be avoided in safeguarding the accused's right to an impartial jury, U.S. Const. amend VI; Ind. Const. art. 1, § 13. See *People* v. *Branch*, (1979) 40 N.Y.2d 645, 651, 415 N.Y.S.2d 985, 987, 389 N.E.2d 467, 469 ("[T]he risk of prejudice arising out of the close relationship between the prospective juror and one of the key participants in the trial was so great that recital of an oath of impartiality could not convincingly dispel the taint."). 417 N.E.2d ct 326

See also, *Block* v. *State*, 100 Ind. 357 (1885) [Juror a deputy prosecutor] and *Barnes* v. *State*, 263 Ind. 320, 330 N.E. [Juror's relative a member of the prosecutor's staff]. 2d 743 (1975).

The *Haak* court went on to emphasize that "[W]ithout question, one improper juror destroys the integrity of a verdict." *Ibid.* at 327. The result in *Haak* could not, rationally, have been any different had the application of the juror's husband been pending, rather than acted upon, at the time of her selection. Parenthetically, in *Haak*, the juror in question knew only that her husband had applied for a position in the prosecutor's office and had no knowledge that he had, in fact, been offered and accepted one. 417 N.E.2d at 323.*

The facts of this case are demonstrably different from those presented in such cases as *Dennis* v. *United States*, 339 U.S. 162 (1950), *reh. den.*, 339 U.S. 950 (1950), in

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* In fact, it was agreed between the prosecutor and the juror's husband that, because she was serving on Haak's jury, her spouse "would not actually begin working for [the prosecutor's] office until Haak's trial was concluded, and that they would not inform [her] of this arrangement until after the conclusion of Haak's trial." *Id.*

which this Court held that employees of the Federal Government could not be disqualified from serving on a jury in a prosecution against the General Secretary of the Communist Party, U.S.A., for his allegedly wilful failure to respond to a subpoena issued by the former House Committee on Un-American Activities. Cf. *Crawford* v. *United States*, 212 U.S. 183 (1980). In *Dennis*, the majority opinion, authored by Mr. Justice Minton, emphasized that mere employment by the Federal Government, by virtue of 49 Stat. 682, D.C. Code § 11-1420 (1940), a jury eligibility act passed after this Court's decision in *Crawford*, *supra*, holding that the bias of government employees "would be implied as a matter of law," 339 U.S. at 166, would not give rise to a challenge for cause. As the majority put it: "A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible." *Ibid.* at 171.* See also *Frazier* v. *United States*, 335 U.S. 497 (1949), and *United States* v. *Wood*, 229 U.S. 123 (1936).

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* It must be noted that this Court grounded its decision on the provisions of the aforesaid new jury eligibility act enacted in the District of Columbia after *Crawford*. However, Mr. Justice Peckam's opinion in that case is just as applicable today to the facts and circumstances of this case as it was when drafted some 73 years ago. As he put it:

> [J]urors must at least have the qualifications mentioned in § 215, but that section does not, on our opinion, so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if his master, servant, steward, counselor, or attorney of either party. In such a case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Cooley's Bl. Com. 4th ed. p. 363; *Block* v. *State*, 100 Ind. 357, 362. In the Indiana case, Judge Niblack, speaking for the supreme court of that state, held in substance in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute. This rule applies as

[Footnote continued on following page]

However, it can hardly be questioned that, had any of the prospective jurors in *Dennis*, *Frazier* or *Wood* been members of the prosecutor's staff, disqualification would have been in order. While those cases do not indicate the nature of the employment of all of the challenged jurors, it is counsel's assumption that none worked for the prosecutors in question or had applied for such employment. While counsel agree with the *Wood* Court that "[I]mpartiality is not a state of mind," 299 U.S. at 145-146, under the circumstances of this case, there is no probative method to ascertain its presence or absence. Here, we are not dealing with the "vague conjecture" that government employees in general are "peculiarly

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well to criminal as to civil cases. Mr. Chief Justice Shepard, in his dissenting opinion in this case, cites many cases to the effect that a clerk or employee of a private party or of a corporation is not qualified to sit as a juror in such a case, over the objection of the opposite side. Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

212 U.S. at 264-5.

vulnerable" to "a miasma of fear" and are "so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors," 339 U.S. at 172, rejected by this Court in *Dennis*. Instead, we are concerned, not with a class of prospective jurors and arguably speculative bias toward someone like Dennis, but rather with one single venireman who was, because of his pending application for employment, "peculiarly vulnerable" to bias against respondent.

Some 150 years ago, Chief Justice Marshall, in words particularly appropriate to this proceeding, stated that a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." *United States* v. *Burr*, 25 Fed. Cas. at p. 50, No. 14692 g. (C.C. Va. 1807). Only a sophist can declare—much less believe—that the juror in this case, anxiously awaiting word of the disposition of his employment application, would not be subject to "a possible temptation . . . not to hold the balance nice, clear, and true between the state and the accused . . ." *Tumey* v. *State of Ohio*, 273 U.S. 520, 532 (1927). Undoubtedly, this case presents the "particular issues or circumstances" exception set forth in both *Wood* and *Frazier*, 339 U.S. at 117.

One example should illustrate the nature of the problem presented by this case. Suppose that all of the jurors at respondent's state trial had submitted applications for employment with the prosecutor shortly after their selection. Could it possibly be said, with any decent respect for the realities of life or Cartesian logic, that such a panel satisfied the requirements of due process? Can it be reasonably denied that these circumstances are "likely to generate bias, consciously or unconsciously," in such

jurors, 339 U.S. at 181 (Mr. Justice Frankfurter's dissenting opinion)? In this case, where only one juror was a job applicant, respondent was just as much entitled to an opportunity for another hung jury as he would have been for an acquittal had all twelve submitted similar employment applications, and pursued them as steadfastly as did Juror Smith.

To hold otherwise is not only to belie the "appearance of justice" standard, so often expounded by this and other federal courts, see *e.g.*, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *In re Murchison*, 349 U.S. 133, 136 (1955); *Rapp* v. *Van Dusen*, 350 F.2d 806 (3rd Cir. 1965); and *United States* v. *Brown*, 539 F.2d 467, 469 (5th Cir. 1976), see Point IB *infra*, but to deny as well the "recognition by law of the facts of life." 339 U.S. at 184 (Frankfurter, J., dissenting). The common law, which developed out of the basic realities of human life, understood that, *inter alia*, prospective jurors, related by blood or marriage to one of the parties or financially dependent thereon, were disqualified from jury service.* As Blackstone noted, a prospective juror should not serve when it is shown:

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* "It was the common law rule and it is generally held in the United States that if the relationship of employer and employee, or a general relationship of principal and agent exists between a party and a prospective juror, the juror is subject to a challenge for that cause." *Busch's Law and Tactics in Jury Trials*, Vol. 1, § 112, p. 705. See also Chief Judge Murrah's dissenting opinion in *Casias* v. *United States*, 315 F.2d 614, 620 (10th Cir. 1963), *cert. den.*, 374 U.S. 845 (1963), where he stated that:

> At common law, jurors were challengeable on principle for bias or partiality due to kinship, interest, former jury service in the same cause, or because the prospective juror was a master, servant, counselor, steward or attorney, or of the same society or corporation. See Cooley's Blackstone, Vol. 2, p. 363.

> that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him.

3 Cooley, Blackstone Commentaries on the Laws of England 363.

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 Thorne, Bracton on the Laws and Customs of England 405 (1968). In *United States* v. *Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. den.*, 393 U.S. 1120 (1969), the Second Circuit forcefully pointed out that "[N]ot only have these common law grounds for causal challenge retained their vitality . . . but to them have been added others from which prejudice or fine may be involved." It is axiomatic that such jurors could hardly be expected to afford a criminal defendant "the right to . . . trial, by an impartial jury," as mandated by the Sixth Amendment.

The fallacy of the argument advanced by petitioner that "[T]he Constitution requires challenges only to jurors who are determined to be actually biased, Petitioner's Brief at 39 *et seq.*, falls apart when one considers a few illustrative examples. Suppose that, following an accused's conviction of murder, it is discovered that one of his jurors (a) was either a close friend or relative of

the victim, a key witness or the prosecutor; or (b) had been provided thereby with the funds necessary to complete his education, start his own business, or pay for his child's needed (and successful) open heart surgery.* At a post-verdict evidentiary hearing, the juror in question testifies that, notwithstanding these circumstances, he had not been influenced by them in any way and had cast his vote for conviction in a wholly unbiased fashion, leading the trial judge to conclude, as a matter of fact, that the juror was not actually biased. It is patent that such a determination simply could not stand in any society which regards the law "as a response to life . . ." 339 U.S. at 182 (Frankfurter, J., dissenting). Or, as put by Mr. Justice Holmes in *Frank* v. *Magnum*, 237 U.S. 309, 345 (1915):

> This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with jurors knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere.

In *Tableporter* v. *Urist*, 157 Misc. 347 (Mun. Ct. 1935), a civil case not dissimilar in fact to the instant one, a juror's son applied to the defendant for employment, which was refused. The Court stated, in holding that the juror in question was disqualified:

> The court cannot ignore the undeniable facts that the juror's son sat with the defendant during an afternoon, asked for employment, which he claims was refused, and yet he returned the following morning and again sat with the defendant in a

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* While challenges for cause may be made upon any of these fact patterns, of 270.20, subd. 1(c), New York Criminal Procedure Law (CPL), as well as for the one here present, the assumption must be made that the defendant, as here, had no knowledge of the imagined circumstances until after his conviction, and, therefore, did not assert any causal challenge.

prominent place in the court room where the jury could observe them together. The interrogation that took place after the verdict was in the presence of all the jurors in the case. The other jurors remained silent. None of them was in any way suspected. But we have not yet reached the day of five-sixths verdicts. A jury must still function as a unit. Their deliberations must be guarded against any extraneous influence that might affect the result. In a recent case, the court said:

> Every litigant is entitled to a fair and impartial trial before an unprejudiced and unbiased jury. A party should not be compelled to submit his rights to a tribunal whose honesty and impartiality can be questioned. The triers of the facts should be beyond suspicion. Otherwise the administration of justice will quickly fall into disrepute. (Payne v. Burke, 236 App. Div. 527).

To the same effect is the Matter of Vanderbilt (127 App. Div. 408) where the court also said: "We cannot determine with certainty, nor is it necessary that we should, that the acts complained of did influence the verdict. It is sufficient for reversal if they are likely to do so."

This language was reiterated by the Appellate Division in this department in setting aside a verdict that was questioned after its rendition. Johnson v. Riter-Conley Manufacturing Co. 149 App. Div. 543.

157 Misc. at 348-349.

Had Smith been employed by the District Attorney, the relationship indisputably would be such as to disqualify him during the *voir dire* under CPL 270.20, subd. 1(c), which disqualifies a prospective juror who bears the "relationship to [counsel for the people] of such

nature that it is likely to preclude him from rendering an impartial verdict." In *Tableporter, supra*, the disqualifying factor was the relationship of the father to the son who applied to the defendant for employment, the father being the juror; here it is the juror himself who was the applicant for employment.

With the exception of *State* v. *Haak*, *State* v. *Block*, and *State* v. *Barnes*, *supra*, counsel has been unable to find any other criminal case even remotely resembling the instant one. Even in *Haak*, as previously pointed out, it was not the juror who was seeking or had obtained employment with the prosecutor, but her husband. All of the citations offered by petitioner to support his thesis that there is no such a concept as implied juror bias refer to circumstances irrelevant to those before the Court. See e.g. *Remmer* v. *United States*, 347 U.S. 227 (1954) [FBI agent sent into jury room without defendant's knowledge or consent to investigate rumor that unnamed person had informed juror he could profit by a verdict in defendant's favor]; *United States* v. *Johns*, 615 F.2d 672 (5th Cir. 1980) [alternate juror learned and advised foreman of the murder of an unidentified trial witness]; *United States* v. *Gross*, 614 F.2d 365 (3d Cir. 1980), *cert. den.*, 447 U.S. 925, 100 S.Ct. 3019 (1980) [Some jurors' annoyance at a marshal's expressed romantic interest in one of their number];* *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980) [post-trial revelation that one juror had complained to the prosecutor throughout the trial of harassment by "voices and "vibrations"]; *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir. 1978), *cert. den.*, 429 U.S. 818 (1976) [non-prejudicial spectator

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* On July 13, 1981, the Arkansas Supreme Court affirmed the overturning of a civil judgment in defendant's favor because a woman juror had, during a recess, told a defense witness that she thought he had "pretty blue eyes." *Moody Equipment and Supply Company* v. *Union National Bank*, No. 81-10 (S. Ct. Ark. 7/13/81). App. L at 12a. Significantly, the Arkansas Court found no actual prejudice to the plaintiff. *Ibid.* at 11a-13a.

"contacts" with jurors]; *United States* v. *Wood, supra,* [mere membership by a juror in a law enforcement agency]; *United States* v. *Johnson,* 401 F.2d 746 (2d Cir. 1968) [employment by a prospective juror in a bank different from that allegedly robbed by defendant]; *United States* v. *Brasco,* 516 F.2d 816 (2d Cir. 1975), *cert. den.,* 423 U.S. 860 (1975) [unauthorized juror visits or telephone calls]; or *Mattox* v. *United States,* 146 U.S. 140 (1892) [a bailiff's derogatory comments about a criminal defendant].*

It is submitted that the *sui generis* nature of the communication of the juror to the prosecutor in this case puts the issue of actual bias in the unprovable category. The wholly subjective nature of the inquiry, divorced, as it is, of any probative objective criteria, makes its goal—the determination of the juror's partiality or impartiality—utterly incapable of proof. As earlier stated, it defies all that we have so painfully learned about ourselves over the centuries to claim, as does petitioner, that a juror who submits an employment application to the prosecutor almost as soon as he is sworn, evidences a more than lively interest in its progress throughout the trial, and pursues it vigorously, beginning with the day after the day after the verdicts are rendered, is not impliedly biased. As the District Court put it:

> Accordingly, the Court finds that Juror Smith was not qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors. The assistant district attorneys who prosecuted these serious criminal charges in

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* See also *United States* v. *Haynes,* [previous jury service in other narcotics cases where some of the government witnesses had testified]; *United States* v. *Gersh,* 328 F.2d 460 (2d Cir. 1964), *cert. den.,* 377 U.S. 992 (1964) [anonymous telephone calls to foreman]; and *United States* v. *Lubrano,* 529 F.2d 633 (2d Cir. 1975), *cert. den.,* 429 U.S. 818 (1976) [federal agent obtained coffee for two jurors during a trial recess].

> state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could likely have been avoided by the substitution of another juror for Smith.
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> App. B at 29a.

Counsel is well aware that some courts have pointed out that it is inexpedient, if not well nigh impossible, to attempt "to create a set of unreasonably constricting presumptions that jurors be excused . . . due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case . . ." *Mikus* v. *United States*, 433 F.2d 719, 724 (2d Cir. 1970).* But the common law standard enunciated by Chief Judge Murrah in *Casias, supra*, or Mr. Justice Black's "average man" test, as set forth in *Dennis, supra*, at 176-77, is not difficult to apply in the various contexts in which implied bias is advanced. Juror Smith was, to echo Blackstone, a prospective "servant" of one party to respondent's criminal prosecution and, under those circumstances, the "average man" must be presumed to

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* For relevant state court cases, see *Locyza* v. *Bklyn and Queens Transit Corp.*, 254 AD 577, 578 (2d Dept. 1938); *Turner* v. *Montgomery Ward & Co.*, 165 S. Car. 253, 258-9, 163 SE 796, 797-98; *Block* v. *State*, 100 Ind. 357 (1885); *People* v. *Provenzano*, 70 AD 2d 960 (3d Dept. 1979), *leave to appeal granted by Judge Jones*, 48 NY 2d 717 (1979), *rev'd* 50 NY 2d 420 (May 29, 1980) and *remanded to App. Div. for further proceedings; People* v. *Harding*, 44 AD 2d 800 (1st Dept. 1974); *People* v. *Cosmos*, 205 NY 91 (1912); *People* v. *Winship*, 309 NY 311 (1955); *People* v. *White*, 22 AD 2d 830 (3rd Dept. 1964); *People* v. *West*, 38 AD 2d 548 (1st Dept. 1971), aff'd 32 NY 2d 944; *People* v. *Cocco*, 305 NY 282 (1953); *People* v. *Kuck*, 43 AD 2d 685 (1st Dept. 1973); and *Matter of Vanderbilt*, 127 AD 408 (2d Dept. 1908).

favor his prospective employer whose goodwill he was actively courting.*

As the record herein abundantly documents, Mr. Smith was busily engaged, during most of respondent's trial, in attempting to become a member of the District Attorney's Major Felony Program. The moment he learned from Criminal Court Officer Fontaine that such employment was possible, he lost no opportunity to advance himself to that end. Not only did he importune Fontaine to ascertain the proper method of applying for such employment, but he followed the latter's instructions to the letter. In fact, once having drafted his application and resume, he gave them to Fontaine in an unstamped envelope for hand delivery to the District Attorney's Office, because he assumed that the court officer had a personal contact therein. Moreover, after the application had reached its destination, he was meeting regularly wtih Fontaine and Jury Warden Piazza in an effort to expedite and facilitate its consideration. No sooner had the trial ended when he contacted the District Attorney to discover the status of his application. When he failed to make contact with the proper person at that office, he asked his former supervisor to do so for him. See App. A at 3a-5a, App. B at 16a-21a.

His selection as a juror in a highly publicized trial came as a golden opportunity for a man about to graduate from college and who planned a career in law enforcement. Prior to respondent's trial, he had already submitted an application for an investigative position with the Drug Enforcement Agency (DEA) of the Depart-

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* While both *United States* v. *Wood*, and *Frazier* v. *United States*, *supra*, hold that proof of mere governmental employment was not enough, standing alone, to impute disqualifying bias in federal criminal proceedings, they clearly indicate that "particular issues or circumstances" might require the exclusion of governmental employees in order to insure an impartial jury.

ment of Justice. App. B, at 16a. Now, his status as a juror in a major trial, with considerable political overtones, would certainly appear to give him an edge over other applicants insofar as the District Attorney was concerned. No one in his position would have to be told that a conviction of respondent would go a lot further toward achieving his heart's desire than an acquittal. His telephone call to Ms. Sudolnik on the day after the verdict is indicative of his sentiments in that regard—he had just delivered and he was striking while the iron was hot.*

Both the trial judge and petitioner made much of the fact that Smith was accepted by the defense in spite of his background in law enforcement and his expressed intention to make a career in that field. See e.g. Petitioner's Brief at 37. Defense counsel, for tactical reasons, apparently thought that such a man would be a suitable juror in a trial involving a police officer as defendant. But it can hardly be said that Smith would have been equally acceptable to the defense if it had been known that he was about to apply for a job with the prosecutor's office. It is one thing to be generally interested in law enforcement, to have held a position as a store detective and to have applied to a federal agency for employment—it is quite another to be seeking a position with the very office prosecuting a criminal defendant. It is pure sophistry to equate the two situations and to claim that Smith was, even with his new application pending with the District Attorney, as desirable to the defense as he may have been during the *voir dire*.**

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* To repeat, "impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood*, *supra*, at 145-6.

** At the very least, the defense should have been given the information withheld by the prosecution so that a challenge, if thought desirable, could have been finally made.

Moreover, the trial judge's blanket acceptance of Smith's vehement protestations that his verdict was in no way conditioned upon his hope of employment by the District Attorney simply cannot be accepted at face value. What person, in Smith's position, could possibly have admitted that he had violated his oath as a juror and, in essence, committed a crime? See Appendix H. It would be asking far too much of human nature to expect anyone in Smith's predicament to admit that his job expectations had in any way or manner influenced his vote in a murder trial. This is precisely why Chief Justice Marshall held that "[I]n determining whether a prospective juror should be excluded on this ground [implied bias] his statements upon *voir dire* are totally irrelevant; a person 'may declare that he feels no prejudice in the case; and yet the law cautiously excludes him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice,' *United States* v. *Burr*, 25 Fed. Cas. at 50." *United States* v. *Haynes*, *supra*, at 984.*

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* In this connection, see also *Vermont* v. *Woodard*, 353 A. 2d 321 (1976), in which a juror in a rape case inadvertently overheard the defendant's end of an incriminating telephone conversation during the latter's trial. The juror heard the testimony of two witnesses and then disclosed his overhearing to the trial judge, who excused him at once. In reversing, the Supreme Court of Vermont stated as follows:

> But with juror Abel remaining with the jury, listening to other testimony in the case, and not disclosing to the court until some hours later the information which subsequently constituted his testimony, circumstances existed capable of influencing the deliberate function of the jury. The defendant did not have to show that the circumstances here existing actually did influence the jury. All that had to be shown was that such circumstances could have had the capacity to influence the deliberation and verdict of the jury. In the absence of proof to the effect that the jury was not influenced by the circumstances here, the danger remained that the capacity to do so did exist. The question

[Footnote continued on following page]

In *Manuel* v. *Oklahoma*, 541 P. 2d 233 (1975), a juror in a murder case, where the defendant was sentenced to life imprisonment, was found by the defense during jury deliberations to be the husband of the District Attorney's local chief secretary. Although there was no showing of prejudice to the defendant, the Oklahoma Court of Criminal Appeals reversed. It found that the jury was not impartial within the Constitutional guarantee where it included one man shown to be prejudiced within the definition of actual bias. As the Oklahoma court put it:

> While we are therefore left to speculate upon whether the defendant was prejudiced thereby, we recognize that the relationship itself approached being a basis for challenge for cause. In *Thompson, supra*, we held in part that a juror who was the brother of a deputy sheriff serving as a witness in chief for the State was subject to challenge for

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is not whether the jury result was influenced by the fact that the juror witness remained one of their number but whether his continued presence had the capacity of influencing the result of their deliberations, and the answer to that must be in the affirmative.

Only suspicion exists as to any influence upon the jury verdict. But, like Caesar's wife, a jury must remain free and untainted by even suspicion. While there is no proof that extraneous influence affected the jury verdict, there were circumstances to show that such a danger did exist.

No right is more fundamental to a defendant than a fair trial by jury, and the law is most sensitive to any infringement or impairment of that fundamental and constitutional right. It is the duty of this Court, when confronted with a record that discloses even a possible infringement of a defendant's right to a jury free and untainted by any suspicion of extraneous influences, to set aside a guilty verdict. For the reason that the verdict below must be set aside and a new trial granted to the defendant, it is not necessary for us to consider any other questions raised by this defendant.

353 A. 2d at 323-4.

> cause because of his close relationship with the deputy sheriff. Also, in *Scrivener* v. *State*, 63 Okl. Cr. 418, 75 P. 2d 1154 (1938), we held that all doubts regarding juror impartiality must be resolved in favor of the accused. In view of the foregoing, we are of the opinion that the defendant was effectively denied full enjoyment of his right to conduct *voir dire* examination of this venireman as a possible basis for challenge for cause, and deprived of information upon which to intelligently exercise a peremptory challenge against him.

541 P. 2d at 236. See also, *Carr* v. *State*, 84 P. 2d 42, 47 (1938), where the same court observed that

> . . . The impartiality of the jury goes to the very foundation of the accused's liberty, and where evidence is introduced such as is disclosed by this record of a convincing character to show that there is a strong probability that the accused was not accorded that fair and impartial trial guaranteed to him by the Constitution and laws of this state, and the rebuttal evidence is of a very unsatisfactory character, the verdict should be set aside and a new trial granted. It requires the unanimous consent of the jury to convict, and a fair and impartial jury is not had by 11 impartial men and one man shown to be prejudiced within the definition of actual bias.

United States v. *Kyle*, 469 F.2d 547 (D.C. Cir. 1972), *cert. den.*, 409 U.S. 1117, involved a situation where three of the jurors had been members of a jury in a prosecution of one Artis. The Artis jury had aquitted and was castigated by the trial judge. The prosecutor in *Kyle* knew of this but made no disclosure to the court. There was no showing of any prejudice to the defendant. While a majority of the court excused the prosecutor and affirmed, Judge Bazelon dissented vigorously. He wrote,

in pertinent part, in line with the enlightened view in *Woodard, supra*:

> A procrustean demand for a showing of prejudice is ill-suited to a case where the very integrity of the judicial process is at stake and where the inability to demonstrate prejudice offers little assurance that prejudice did not exist. Cf. R. Traynor, The Riddle of Harmless Error, 64-66 (1970).

Petitioner, as did the trial court, makes much of the fact that no one in the District Attorney's Office contacted Smith after it was learned that he was a juror in respondent's trial. Petitioner's Brief at 12, 15.* However, this course of conduct surely kept alive the hope in his mind that he was actively being considered for the position which accounts for both his call to Ms. Sudolnik on the day following the verdicts and his immediate subsequent request to his former supervisor to intercede for him through his contacts in the District Attorney's Office. It was only when, long after the conclusion of the trial, he learned from an attorney friend that he lacked the necessary experience for the position that, as petitioner concedes, "he abandoned hopes of being hired by the District Attorney." Petitioner's Brief at 12.

To claim that any person in Smith's position would not be influenced by his pending application is to fly in the face of all we know about human nature.** Further-

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* In fact, the chief trial prosecutor specifically instructed Ms. Sudolnik to make no response to Mr. Smith's application.

** One of the grounds advanced in defendants' successful motion to dismiss the indictments against them in *United States v. Daniel Ellsberg and Anthony J. Russo*, No. 9373-WMB-CD, C.D. Cal., was the fact that the presiding judge in that case had been offered "a proposed future assignment in government," [the directorship of the FBI] during the trial by the President at the San Clemente White House. Tr. 21, 333.

more, the acceptance of such a juror's fervent and repeated representations, see Petitioner's Brief at 12-13, given the circumstances here present, is to make credible the strenuous insistence of the fabled fox discovered inside the chicken coop that he meant no harm to its occupants. Clearly, the "possible temptation to the average man . . . not to hold the balance nice, clear and true between the state and the accused," *Tumey* v. *Ohio, supra* at 532, was here present and no amount of sophisticated discussion about state statutes dealing with juror standards or decisions dealing with fundamentally different fact situations can disguise that reality. By affirming the court below, this Court will be striking a heavy blow for fairness in criminal prosecutions.

B. The Smith Incident, Even If Not Considered To Have Actually Denied Respondent His Fifth And Sixth Amendment Rights, Violates The Appearance Of Justice Standard.

Recently, in *United States* v. *Brown*, 539 F.2d 467 (5th Cir. 1976), the conviction of H. Rap Brown, another controversial figure, was reversed because the trial judge's derogatory pretrial statement was held not to comport "with the appearance of justice." 539 F.2d at 470. The judge conducting the hearing on appellant Brown's motion to vacate his conviction and sentence, while finding that the derogatory remark had been made by the trial court, nevertheless denied the motion on the ground that "[U]pon a review of the record, he found that appellant had a fair trial." *Id.* at 469.

In unanimously reversing appellant's conviction, the Fifth Circuit, citing *In re Murchison*, 349 U.S. 133 (1955), *Knapp* v. *Kinsey*, 232 F.2d 458 (6th Cir. 1956), and *Rapp* v. *Von Dusen*, 350 F.2d 806 (3d Cir. 1965), held that "[T]he judge's statement did not comport with the appearance of justice, and it cannot be said from the

record alone that the appellant received a fair trial." * The same can certainly be said with reference to respondent, and Juror Smith's assurances that his pending application for employment did not influence him can be no more dispositive of the issue than was the statement by Brown's trial judge that "I would categorically deny that I would make such a statement." *Id.* at 468. As the Fifth Circuit pointed out, 28 U.S.C. § 455(a) now requires the mandatory disqualification of a federal judge "in any proceeding in which his[her] impartiality *might reasonably be questioned.* . ." *Id.* at 470. (emphasis in original). Can it logically be denied that Juror Smith's "impartiality might reasonably be questioned. . ."? The trial judge himself answered this question in the negative when he pointed out "the possible construction which might be placed upon [sending the application for employment]." App. E at 44a.

Additionally, as in *Brown*, it is impossible to know what effect Smith had on other jurors prior to or during deliberation. As stated by the *per curiam* court, "[T]he record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which . . . might have adversely influenced the jury and affected its verdict." 539 F.2d at 469. Here, Smith, the only police-oriented juror, might well have had an influence on his fellow panel members far in excess of his single vote. With a jury that deliberated

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* See *United States* v. *Zannowitz*, 326 F. Supp. 90, 91 (C.D. Cal. 1971), where the court stated: "Like Caesar who parted from his wife Pompeia because she was not above suspicion, so here to avoid even the *appearance* of a *possibility* of personal bias or prejudice, wise discretion and sound judgment compel us to leave this case . . ." (emphasis in original). See also, *United States* v. *Quattrona*, 149 F. Supp. 240 (D. D.C. 1957) and *Mesarosh* v. *United States*, 352 U.S. 1, 14 (1956).

for eleven hours over two days in reaching its verdicts,* Smith, who could reasonably have been regarded as a police officer by his colleagues, may easily have tipped the scales against respondent, and there would be no record indication that such was the case.

Respondent was, of course, entitled to the verdicts of a jury whose integrity could not reasonably be questioned. In addition, he was entitled to a hung jury if the prosecution could not convince each juror of his guilt beyond a reasonable doubt on each and every charge. The presence of Juror Smith on his panel, if not "suspect" as a matter of law, clearly violated the "appearance of justice" standard as enunciated in *Brown* and *Rapp, supra.*

In an era when the fairness and equality of the criminal justice system are being questioned in many quarters, it behooves all courts to take any steps which might dispel such chronic and, in the eyes of many obsevers, justified mistrust.** The recent carnage and bloodshed in Miami and other cities should not be the

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* Despite the trial court's conclusion that the evidence against appellee was "overwhelming," App. E at 33a, the 10-2 for acquittal vote in the first trial, the length of the jury's deliberations at the second, the fact that most of the key witnesses against him were prostitutes or their patrons testifying four or more years after the commission of the crimes in question, the change in testimony of his wife after her estrangement from him, and the concession by the People during oral argument in the state courts that the introduction of immunized testimony spelled the differences between a 10-2 vote for acquittal and a conviction, argue to the contrary.

** In *Crawford* v. *United States, supra,* Mr. Justice Peckham emphasized that "[T]o maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject. 29 S. Ct. at 264.

touchstone of a civilized response to injustice, real or imagined. This case comes at an opportune time for this Court to insure that neither respondent, nor anyone else, should be forced to stand trial before a jury, one of whose members is actively seeking to be employed by the very office which is prosecuting him.

II

The Evidentiary Hearing Conducted By The State Court Should Not Be Controlling.

A. The Hearing Was, By The Nature Of Its Inquiry, Destined To Be Ineffectual.

Petitioner repeatedly argues that the holding by the state judge of a post-conviction evidentiary hearing satisfied the requirements of *Remmer* v. *United States*, 347 U.S. 227 (1954), with respect to post-verdict claims based on alleged juror bias.* Petitioner's Brief at 20, *et seq.* Respondent has already indicated, at some length, in Point I, *supra*, that, in view of the within circumstances, no hearing could possibly achieve anything vaguely approaching a probative result. A Remmer-type hearing only makes sense when, as in that case, there is something less involved than a juror's own affirmative misconduct and the strong probability that his admission that such misconduct affected his verdict would subject him to punitive measures, public scorn and/or the loss of an employment opportunity. In this connection, see *e.g.*, New York Penal Law (PL) § 195.05 (Obstructing Governmental Administration); § 215.50 (Criminal Con-

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* In *Remmer*, the issue was the effect of "[T]he sending of an FBI agent in the midst of a trial to investigate a juror" who had been contacted by an unnamed person who "remarked to him that he could profit by bringing in a verdict favorable to the petitioner [defendant]". 347 U.S. at 228-229.

tempt in the Second Degree); § 215.20 (Bribe Receiving by a Juror); and § 215.30 (Misconduct by a Juror), Appendix H.*

B. Prosecutional Misconduct.

However, there is an even more compelling reason why, in this case, the post-conviction hearing cannot be held to have dispelled the taint created by Juror Smith's application for a position with the prosecutor. It must constantly be kept in mind, as stressed by both the Court of Appeals majority, the District Court, and the state trial judge, that the prosecutors were guilty of (a) "the withholding . . . of information casting substantial doubt as to the impartiality of a juror," App. A at 10a, (b) the "inexcusable abridgement of [respondent's] Sixth Amendment right," App. B at 29a, and/or "questionable conduct" App. E at 52a, and "unique misjudgment," *Ibid.* at 57a.** Moreover, all of these courts emphasized that, had the prosecutors disclosed the information about Juror Smith's job application, which they had long before the case was submitted to the jury, he might have been easily replaced by one of four available alternates. The failure of the prosecutors to disclose the information they possessed about the Smith job application is doubly egregious in view of their willingness to reveal the fact that another juror was scheduled to be a witness for another prosecutorial office in an unrelated prosecution and to agree to his replacement by an alternate. App. E at 34a.

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* Significantly, after the post-verdict hearing conducted by the state court judge, the chief trial assistant revealed that Juror Smith had drug-related and family problems in 1970 or 1971, had spent some time in a Connecticut mental institution (Silver Hills) and had had problems with the police in New York City and Australia. Hearing Transcript at 893, 895-7.

** The state court judge also characterized the juror's conduct as "unprecedented imprudence", App. E at 57a and an "extraordinary development." *Ibid.* at 39a.

In short, the evidentiary hearing held by the trial court was made necessary, not by the routine post-conviction discovery of facts which might point to the possibility of a juror's bias, but by the wilful failure of the prosecutors to make timely disclosure of such information.* It is obvious, given the different approach adopted by them in the case of Juror Bethel, that they were more interested in retaining Smith on the jury which passed on respondent's guilt or innocence than Bethel. Accordingly, they made a calculated decision to reveal the latter's relationship as a potential prosecution witness with the Special Narcotics Prosecutor, which maintains its office separate and distinct from that of the District Attorney, while withholding what they had learned about Smith's job application. This is nothing short of prosecutorial misconduct of the most flagrant sort.

It is, perhaps, the tragic hallmark of our times that those guilty of such misconduct, no matter how wanton or gross, are almost never punished. In drafting this brief, counsel gave thought to what would have happened to the defense attorney had, following respondent's hypothetical acquittal, it been discovered that, during the trial, one of the jurors had secretly written to him to apply for a job in his office, and he had not disclosed that fact to the Court and the prosecutor. It does not take much imagination to realize that, in such a situation, there would have been enormous repercussions on both the criminal and disciplinary levels.

Yet, in the within case, demonstrable "questionable conduct" on the part of the prosecutors, is ingenuously excused by petitioner on the primary ground that the perpetrators "were preoccupied with preparing for the

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* "Here, the failure to hold a hearing [during the trial] resulted from a prosecutor's serious error in judgment." Petitioner's Brief at 31.

crucial stages of this important murder trial," Petitioner's Circuit Court Brief at 39, and were "caught up in the press of trial." *Id.* at 40. See also Petitioner's Brief at 31, fn. 11. Even the trial judge adopted the viewpoint that they had "permitted the pressures of the case to becloud their professional vision . . ." App. E at 52a. Counsel can well imagine how such an untenable excuse would fare if the shoe was on the other foot.

If all of these self-serving apologia were, in fact, true statements of why the prosecutors did not reveal the existence of Smith's application when it came to their attention, what prevented them from so doing after the summations and the charge but before the jury retired to begin its deliberations, when, presumably, they would be free of trial tensions? After all, there were at least three alternates still available and Smith could easily have been replaced. The long and the short of it is that, once having learned of Smith's application, they considered him to be a pro-prosecution juror and did not want to lose him in what all concerned considered to be an extremely close case. The District Court clearly understood the obvious motivation behind their failure to disclose *at any time* * Smith's pending application when it wrote:

> The assistant district attorneys who prosecuted these serious criminal charges in state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could

* Significantly, it was their superior who eventually made the disclosures. App. A at 5a.

> likely have been avoided by the substitution of another juror for Smith.
>
> App. B of 29a.

As previously indicated, the Smith incident was not the first instance of juror disqualification to surface during respondent's trial. Although the prosecutors discovered three days after the presentation of evidence began that Juror No. 6, one Lawrence Bethel, had earlier agreed to cooperate with the Special Narcotics Prosecutor by testifying against the alleged seller of narcotics to him in exchange for the dismissal of misdemeanor charges against himself, they did not bring this fact to the trial court's attention until the completion of summations, more than a month and a half later. Following their belated disclosure, the parties all consented to Mr. Bethel's discharge and replacement by the first alternate.

Recently, in *United States* v. *Falk*, 605 F.2d 1005 (7th Cir. 1979), former Chief Judge Swygert, in commenting upon what he termed "flagrant . . . abuse . . ." by the prosecutor in his summation to the jury, 605 F.2d at 1015, stated, in dissenting from the majority's affirmance of an income tax conviction, as follows:

> Unfortunately flagrant abuses of professional standards, such as the foregoing, seem to be occurring more frequently in this circuit. I believe that the reasons include the fact that competitive and ambitious prosecutors (perhaps reflecting the ethos of the 1970's) think that to win by any means is the 'name of the game'. Further they are emboldened to flaunt the *Berger** admonition by the inaction of trial judges who fail to stop such improper advocacy conduct in its tracks and this court's bark—scoldings and warnings—with no bite.
>
> *Ibid.* at 1016.

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* *Berger* v. *United States*, 295 U.S. 78 (1935).

On two separate occasions in recent months, appellate courts in New Jersey have urged that state's Supreme Court to take steps to halt what they termed to be the "serious misconduct" of prosecutors during criminal trials. In *State* v. *Walsh*, Superior Court, Bergen County, the Appellate Division stated, on December 26, 1979, that while it did not find the misconduct in question "highly questionable" remarks during summation sufficient to merit reversal of appellant's conviction:

> We deplore conduct of any prosecutor that transcends the bounds of propriety. We censure the prosecuting attorney in this case although, in the circumstances, we find a reversal is not warranted. We cannot be sure that stern warnings and occasional reversals have been sufficient to control the problem.
>
> It may be time for our Supreme Court to consider disciplinary proceedings as a means of holding this conduct in check.

New York Times 12/27/79. The same court, barely more than a month later, in reversing a conviction because of another instance of a "particularly prejudicial" summation by a prosecutor, again implored the Supreme Court to take some action to bring such misconduct to an end. *New York Times*, 2/3/80.

The breakdown in official morality represented in *Falk* and *Ellsberg*, *supra*, and such recent cases as *United States* v. *Banks*, 383 F. Supp. 389 (D. S.D. 1974), *appeal dismissed* 513 F.2d 1329 (8th Cir. 1975), and *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980), to name but a few, is, to put it mildly, appalling. They seem to infect the jurisprudence of every state and federal district and reflect a frightening trend that, unless soon checked, may well undermine the social and political structure of the nation as a whole. If the law may be

perverted for some defendants, either because of the heinous nature of the crimes of which they stand accused, their pariah status, or their political or social views, then it will eventually be defaced for everyone.

What is perhaps the most disturbing aspect of this endemic misconduct is the public apathy toward it. An electorate that rarely, if ever, learns of any adequate condemnation of or punishment for such misdeeds inevitably builds up a tolerance for them. In such an atmosphere, the cancer spreads rapidly and what Circuit Judge Swygert sadly referred to in *Falk, supra*, as "the ethos of the 1970's" will surely taint succeeding decades unless our courts take affirmative action to clear the air. This case presents a significant opportunity for the cleansing process to begin.*

In New Jersey, an appellate court has recently pointed the way in this respect. In *State* v. *Thomas*, 168 N.J. Super. 10 (App. Div. 1979), which involved the conviction of appellant for armed robbery, atrocious assault and battery, and numerous other crimes, the court, in reversing, stated as follows:

> The evidence was clearly sufficient to support the verdict of guilty returned by the jury [n]evertheless, it is reluctantly concluded that the judgment of conviction must be reversed and the matter remanded for a new trial because of prosecutorial excesses and improprieties. Repeatedly expressing concern for prosecutorial misconduct, the Supreme Court has stated that, in appropriate cases, a mere expression of displeasure would not be a

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* Only days ago, a District Court set aside the convictions of a number of defendants accused of counterfeiting-tape charges on the primary ground of the prosecutor's "attempted cover-up of the false statements" given by a prosecution witness during trial. See *United States* v. *Sam Goody, Inc. et ano.*, CR 80-95 and CR 80-507 (EDNY, 7/27/81) Appendix M.

> sufficient remedy, and more severe action may be necessary.
>
> This is such a case; the conduct of the prosecutor induced errors of such magnitude and number, as to deprive defendant of a fair trial.

The Court of Appeals was, quite obviously, deeply concerned with not only the "harm . . . to the accused" caused by prosecutorial misconduct, but by that caused "to society as a whole" when this "appearance of justice" is destroyed. *Rose* v. *Mitchell*, 443 U.S. 545, 555-56 (1979). App. A at 10a. In affirming the judgment of the District Court, it emphasized this prophylactic approach when it stated:

> To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process. We . . . hold that the prosecutor may not keep silent when he knows that a juror has applied to become his employee.*
>
> *Id.*

This Court should do no less.

III

The Implied Bias Of A Trial Juror In A State Criminal Case Is An Appropriate Subject For Federal Habeas Corpus Review.

Petitioner concedes, in discussing *Stone* v. *Powell*, 428 U.S. 465 (1976), that "unlike Fourth Amendment claims such as those at issue in *Stone*, claims involving alleged

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* See also *Taylor* v. *Lombard*, 606 F.2d (2d Cir. 1979).

juror bias in a state proceeding may be reviewed in federal habeas corpus proceedings." Petitioner's Brief at 30. However, he goes on to assert that "[N]onetheless, in habeas corpus review, federal courts must treat state hearings and the judges who hold them in the same manner and with the same respect offered *Remmer*-type hearings held by federal judges. *See* 28 U.S.C. 2254(d); *Sammer* v. *Mata*, — U.S. —, 101 S.Ct. 764, 770-71 (1981) (discussed at pp. 34-35, *infra*." *Id.*

Respondent has already indicated that, no matter how searching the state court hearing as to Juror Smith's partiality or impartiality may have been, the only possible proof, one way or the other, had to come from the juror himself. In this case, as noted by the Court of Appeals, "it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial'." App. A at 7a. Accordingly, given the within facts and circumstances, this is not the type of "factual issue" which "can be presumed to be correct" under the provisions of 28 U.S.C. 2254(d).

It would seem that the standard established by this Court in *Rose* v. *Mitchell*, 443 U.S. 545 (1979) is the only one reasonably applicable to this case. The fact that a juror in a double murder trial (1) applied to the prosecutor for a position shortly after the taking of testimony had begun, (2) caused others to make inquiry of his application's progress during the trial, and (3) contacted the prosecutor's office with reference thereto the day after the verdicts, while the trial assistants withheld knowledge from the Court and the defense that such an application had been filed with their office, certainly is "odious in all respects, is especially pernicious in the administration of justice . . . [and] thereby casts doubt on the integrity of the judicial process." 443 U.S. at 55-6. See also *Peters* v. *Keff*, 407 U.S. 493, 506-07 (1972) (White, J. concurring).

In the last analysis, the Court is here confronted with a unique situation involving, as it does, the application by a trial juror for a job with the prosecutor, and the withholding of this information from both the court and the defense counsel by the latter. Not only is a Remmer-type hearing totally inappropriate, for the reasons previously given, but it would be difficult to imagine any rational disagreement with the proposition that a jury containing such a juror would "cast[s] doubt on the integrity of the judicial process." *Rose* v. *Mitchell, supra,* at 506-07. Simply stated, any jury containing someone in Mr. Smith's position cannot be held to comport with the requirements of the Sixth Amendment.

CONCLUSION

Unless this case is to be treated differently from any other one and the applicable law totally disregarded, respondent is patently entitled to a resounding affirmance of the judgment of the Court of Appeals and/or the District Court. Any other result would be an intolerable violation of his rights to due process, the equal protection of the law and to a fair and impartial jury, and serve to discredit the entire legal system and those who administer it.

As Chief Justice Burger stated in *TVA* v. *Hill,* 437 U.S. 153, 195 (1978):

> The lines ascribed to Sir Thomas Moore by Robert Bolt are not without relevance here:
>
> > The law, Roper, the law. I know what's legal . . . I'm *not* God. The currents and eddier of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . what would you do? Cut a great road through the law to get after the Devil? . . .

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake. R. Bolt, A Man For All Seasons, Act 1, p. 147 (Three Plays, Heinemann, ed. 1967).

WHEREFORE, it is respectfully prayed that the judgment of the courts below be affirmed.

Dated: New York, N.Y.
August 3, 1981

Respectfully submitted,

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* Counsel wish to express their appreciation to legal worker Jane B. Ransom, and law student Ronald Brown, for their invaluable assistance in the preparation of this brief.

APPENDIX

Appendix H (Penal Law)

§ 195.05 OBSTRUCTING GOVERNMENTAL ADMINISTRATION

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor.

L.1965, c. 1030.

§ 215.20 BRIBE RECEIVING BY A JUROR

A juror is guilty of bribe receiving by a juror when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, decision or other action as a juror will thereby be influenced.

Bribe receiving by a juror is a class D felony.

§ 215.30 MISCONDUCT BY A JUROR

A juror is guilty of misconduct by a juror when, in relation to an action or proceeding pending or about to be bought before him, he agrees to give a vote, opinion, judgment, decision or report for or against any party to such action or proceeding.

Misconduct by a juror is a class A misdemeanor.

L.1965, c. 1030.

§ 215.50 CRIMINAL CONTEMPT IN THE SECOND DEGREE

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

Appendix H (Penal Law)

1. Disorderly, contemptuous, or insolvent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceedings; or

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory; or

5. Knowingly publishing a false or grossly inaccurate report of a court's proceeding; or

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen, seventeen, eighteen, or eighteen-a of the judiciary law,[1] or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein; or

7. On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the

character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial.

Criminal contempt in the second degree is a class A misdemeanor.

Appendix I

Excerpt from *The New York Times*, November 22, 1976, Page 22, Column 4

Jury Convicts Phillips on 2 Brothel Murders in 1968

By Alfred L. Clark

The jury had deliberated for 11 hours over a two-day period. . . .

• • • • •

Mr. Phillips was first tried on the murder indictment in the summer of 1972. That trial ended in a mistrial with the jury reportedly 10 to 2 for acquittal.

• • • • •

Appendix J

Excerpt from the *New York Daily News*, November 22, 1976, Page 5, Col. 1

Phillips Guilty of Murdering Pimp & Prostitute

By D. J. Saunders

* * * * *

An all-male jury returned the verdict in Manhattan Supreme Court before Justice Harold Birns at 3:57 p.m. after almost 11 hours of deliberation over two days.

* * * * *

* * * At Phillips' first trial for the double slaying—which ended with a hung jury—the jury also had asked for Gonzalez' testimony to be reread. The jury reportedly had voted 10 to 2 for acquittal.

* * * * *

Appendix K (Affidavit of Michael F. Armstrong)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL F. ARMSTRONG, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the practice of law in the State of New York and a member of the firm of Barrett Smith Schapiro Simon & Armstrong, 26 Broadway, New York, New York 10004.

2. From July 1970 through December 1972, I served as Chief Counsel for the Commission to Investigate Allegations of Police Corruption and New York City's Anti-Corruption Procedures, a citizens' commission charged with the task of investigating police corruption in the New York City Police Department. The Commission, known as the "Knapp Commission" after its chairman, Whitman Knapp, was created by Mayor John Lindsay's Executive Order No. 11, dated May 21, 1970 (attached hereto as Exhibit 1) and City Council Local Law No. 13, enacted May 27, 1970 (attached hereto as Exhibit 2). The Mayor acted in response to a letter, dated May 14, 1970, from a committee headed by Corporation Counsel J. Lee Rankin, which had been appointed to look into specific charges of police corruption made in the public press (a copy of this letter is attached as Exhibit 3).

3. In or about May 1971, Commission agents conducted an investigation of police corruption on the East Side of Manhattan, which led to officer William R. Phillips. Mr. Phillips, a patrolman assigned to the 25th Precinct in upper East Side Manhattan, was observed, recorded and photographed in the commission of several corrupt acts involving accepting money from an East Side prostitute.

4. When confronted with the evidence of his actions, Mr. Phillips agreed to give the Commission information

about police corruption and to work as an undercover agent. He made this agreement on the condition that he would be afforded immunity for matters which he described to the Commission.

5. The Commission did not have the power to grant immunity. Therefore, I requested Whitney North Seymour, Jr., the United States Attorney for the Southern District of New York, to agree that if Mr. Phillips' work resulted in substantial federal indictments of either organized crime figures or corrupt police officers, he would be granted immunity and Mr. Seymour would see to it that such immunity was honored by state authorities. Mr. Seymour agreed, and authorized me so to inform Mr. Phillips.

6. Pursuant to this agreement, Mr. Phillips worked as an undercover agent for the Commission for approximately five months. He participated in a total of 69 operations in which tape recorded conversations involving corruption were obtained. As of the time of the submission of the Commission report to the Mayor on December 26, 1972, Mr. Phillips' efforts had resulted in indictments of 31 individuals. Six federal and six New York County indictments named a total of 17 police officers and 14 other persons, most of whom were organized crime members. Many more indictments were anticipated as a result of Mr. Phillips' work, but his own indictment, on March 20, 1972, on charges of murder and attempted murder aborted most of these efforts.

7. During the summer of 1971, I recorded a conversation with Mr. Phillips, during which he recounted many of his experiences during his police career. He described in detail many instances of corruption, including his experience with a Jimmy Smith, who was a pimp and gambler operating on the East Side. This tape recording was made in order to demonstrate to the

commissioners the type of information to which Mr. Phillips could testify at a public hearing.

8. In other interviews with me and members of my staff, Mr. Phillips told us other details about corrupt dealings with Mr. Smith.

9. In his public testimony before the Knapp Commission, for which I prepared Mr. Phillips, he testified about an incident involving Mr. Smith. As with other such testimony, no names were used and the events were described in general terms.

10. In early 1972, it was revealed that Mr. Phillips was under investigation for the 1968 murder of Mr. Smith and one other person, and the attempted murder of a third person. He was subsequently indicted on March 20, 1972. During the course of the investigation of this matter, the Commission staff responded to all inquiries made by the District Attorney's office and made its files available to the investigators looking into the case. Police officers from the Internal Affairs Division had open access to Commission files. The Commission also made available tape recordings taken during the course of this investigation, including the tape recorded interview with Mr. Phillips referred to in paragraph 7 above.

11. It was my clear and unequivocal understanding that William Phillips, in return for his successful efforts in developing criminal cases against corrupt police officers and organized crime figures, would receive full and complete transactional immunity for all matters about which he gave information. I have spoken to Whitney North Seymour, Jr., Esq., formerly United States Attorney for the Southern District of New York, and he has no recollection contradictory to mine.

12. I am informed that the tape recorded interview of Mr. Phillips was used by the prosecution against him

at his trial. It is also clear that the information provided to the prosecutors by the Commission regarding Mr. Phillips' admitted contacts with Mr. Smith afforded leads which were followed up by detectives investigating the case and ultimately resulted in evidence used against Mr. Phillips. The detective who re-opened the investigation has stated that he did so on the basis of information obtained from Mr. Phillips' public testimony before the Knapp Commission.

/s/ MICHAEL F. ARMSTRONG
MICHAEL F. ARMSTRONG

Sworn to before me this
27th day of April, 1978.

/s/ JOAN FARRELL

Joan Farrell
Notary Public, State of New York
No. 03-4521830
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 23, 1980

Appendix L (Opinion Delivered July 13, 1981)

SUPREME COURT OF ARKANSAS

No. 81-10

Appeal from Madison Circuit Court;
Paul Jamieson, Judge.

MOODY EQUIPMENT & SUPPLY COMPANY,
Appellant,

v.

UNION NATIONAL BANK, Administrator, et al.,
Appellees.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. In this action for the wrongful death of William Dale Pryor, brought by the appellee bank as administrator, the jury's verdict was for the defendant, Moody Equipment & Supply Company. The trial judge, however, granted the plaintiff's motion for a new trial for misconduct of a witness for the defendant. ARCP, Rule 59 (a). For reversal Moody argues that it was entitled to a directed verdict and that the trial court abused its discretion in granting a new trial. The case falls within our jurisdiction under Rule 29 (1) (o).

The complaint, among other allegations, asserted that Moody was strictly liable for having sold a used crane that was so defective as to make it unreasonably dangerous. Ark. Stat. Ann. § 85-2-318.2 (Supp. 1979). At the time of the accident the decedent, an employee of the general contractor on a building construction job, was loading plywood onto a harness so that it could be lifted by the crane. The crane's boom was extended over a high voltage line. The plaintiff's proof indicated that the piston cups in the crane's hydraulic system were so worn by long use that the fluid bled out. The resulting

loss of compression caused the crane's boom to inch downward about four feet and touch the power line, electrocuting Pryor.

Moody does not seriously deny that it was at fault in selling the crane without having inspected the piston cups, but it argues that its negligence was superseded by various intervening causes, such as the contractor's failure to have the power line de-energized, the omission of several safety measures required by Ark. Stat. Ann. §§ 81-1405 and -1406 (Repl. 1976), and the crane operator's failure to discontinue its use after the boom had unaccountably descended earlier on the same day. The jury, however, could have found from the evidence that the possibility of such occurrences was reasonably foreseable in the ordinary course of the crane's intended use in construction work, so that the later acts of negligence by third persons became merely concurrent, not superseding, causes of Pryor's death. See *Franco* v. *Bunyard*, 261 Ark. 144, 547 S.W. 2d 91 (1977), cert. den. 434 U.S. 835 (1977); *Hartsock* v. *Forsgren*, 236 Ark. 167, 365 S.W. 2d 117 (1963). Hence Moody was not entitled to a directed verdict.

Second, near the end of the trial the plaintiff moved for a mistrial on the ground that two of Moody's witnesses, Jordan and Andrews, had been seen in conversation with jurors. The court at once conducted a hearing in chambers, but nothing of a seriously prejudicial nature developed. In particular, Andrews testified only that he had talked with one juror about having been in the military service and had recommended a Little Rock hotel to another juror. The court did not make a ruling, because at the close of the in-chambers hearing the plaintiff withdrew its motion for a mistrial.

After the verdict, however, the plaintiff raised the point again in a motion for a new trial. This time the proof developed misconduct not touched upon at the in-

chambers hearing and not then brought to the attention of the plaintiff's attorney. A witness testified that during a recess a female juror had mentioned Andrews' blue eyes to him in a "downright flirty" manner. Another witness testified that he heard Andrews ask a juror (presumably the same one) where she lived and if it would be all right if "they" came to see her sometime; she said she'd be glad if they did. Andrews admitted that the juror told him he had pretty blue eyes, but he denied the rest. The trial judge evidently accepted the other testimony, which would indicate that Andrews had not been completely candid at the in-chambers hearing during the trial.

To reverse the judgment we would have to say that the trial judge abused his discretion in granting the motion for a new trial. It is fundamental, however, that the latitude of the trial judge's discretion increases proportionately as the situation presents to him a question that cannot equally well be presented to us by the printed record. For instance, we seldom reverse the trial judge's decision to grant a new trial on the ground that the jury's verdict was in his opinion contrary to the preponderance of the testimony. See *Smith* v. *Villarreal*, 253 Ark. 482, 486 S.W. 2d 671 (1972). There he has the unique advantage of having heard the testimony at first-hand. Again, we have deferred scores of times to the trial judge's ruling upon a motion for a continuance. There he knows, for instance, as we cannot know, the propensity of a certain lawyer to seek a continuance in every case, or a docket condition that justifies a delay only for the strongest of reasons, or other matters not to be found in the printed record.

This case properly falls in the same category with respect to the trial judge's discretion. This trial judge had heard all the testimony and was in a position far superior to ours to know whether the proof was so nearly

balanced that the misconduct of a witness and juror might have tipped the scales one way or the other. The trial judge had the advantage of having observed the witness Andrews at the in-chambers hearing, when the witness was understandably apologetic about having spoken to jurors at all. The trial judge was of course familiar with the courthouse in which the case was tried and knew to what extent its adequacy or deficiencies might or might not have brought witnesses and jurors into unavoidable contact with one another during recesses. In a situation such as the one presented by this case, it is not our place to set aside the trial judge's decision unless we can say with confidence that his discretion was markedly abused. Here we cannot make that statement.

Affirmed.

Adkisson, C.J., and Purtle, J., dissent.

Appendix M

Excerpt from *The New York Times*, July 28, 1981, Page 1, Column 2

Convictions Thrown Out in Sam Goody Tape Case

By Joseph P. Fried

A Federal judge yesterday threw out the convictions of Sam Goody Inc. and a vice president of the company on counterfeit-tape charges and accused the prosecution of misconduct.

The judge, Thomas C. Platt of Federal District Court in Brooklyn, presided last spring at the five-week trial involving the company, one of the oldest and largest chains of recorded-music stores in the United States.

The trial had followed a yearlong undercover investigation by the Justice Department into what officials called widespread operations that illicitly duplicated cassettes and eight-track tapes of popular music as well as their original labels and packaging.

In throwing out the convictions and ordering a new trial for the company and its vice president, Samuel Stolon, the judge held that the jury's deliberations at the original trial might have been "tainted" by various conditions.

One of these, he said, was the prosecutor's "attempted cover-up of the false statements" given by a Federal Bureau of Investigation agent who was a prosecution witness during the trial.

"Only after the court, in effect, directed the Government to do so did it correct the false testimony," Judge Platt said yesterday. "By that time, many days after the false testimony had been given, much, if not all, of the significance of the falsity of the testimony may well have escaped the jury."

Appendix M

The judge was referring to two appearances before the jury by the agent, Richard Ferri. In his original appearance, Mr. Ferri indicated certain key notes he had taken at meetings with Government informants had been lost or destroyed. In his second appearance, he said that the notes had not, in fact, been lost or destroyed because he had not taken them to begin with. Mr. Ferri added that his original testimony had been the result of faulty recollection.

* * * * *

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Petitioner,

—against—

WILLIAM R. PHILLIPS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF ON THE MERITS FOR RESPONDENT

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Preliminary Statement

This supplemental brief is filed pursuant to Rule 22.6, Rules of this Court, providing for the filing thereof to call attention "to new cases or legislation or other intervening matter not available at the time of the party's last filing." Respondent's Brief and Appendix were filed on August 3, 1981. On August 24, 1981, in the advance sheets to volume 652, Federal Reporter, at Page 654, respondent's counsel discovered the case of *McCoy* v. *Goldston*, which was decided on June 26, 1981, by the Sixth Circuit. In their opinion, the decision in that case is relevant and material to some of the questions presented in the instant one.

ARGUMENT

McCoy v. *Goldston*, 652 F.2d 654 (6th Cir. 1981) involved a suit, brought, pursuant to 42 U.S.C. 1983, by two plaintiffs against several Detroit police officers and that city's Police Department for the alleged violation of the former's civil rights. During the *voir dire* of prospective jurors, the trial judge asked the venire whether any of its members had "any experience with any law enforcement agency, or any way with the law, whether it is a police department or any other agency. . . . [or] any close friends or relatives who are connected or associated with any law enforcement agency or police department." 652 F. 2nd at 656. Of the three prospective jurors who answered these inquiries in the affirmative, one, who had several friends who were retired police officers, was subsequently excused because of a hearing problem; another, who stated that he had served as an Army military policeman and worked as a records supervisor and substitute corrections officer in 1953, was peremptorily challenged by plaintiff's counsel; while a third, who revealed that her husband was an auxiliary police officer who engaged in traffic control and similar duties, was accepted as a trial juror, *Id.*

However, the foreperson, a Mrs. Cleo Green, failed to disclose that her son was about to complete a training course as a parole officer. *Id.* This information did not come to light until plaintiff's counsel, following an adverse jury verdict, interviewed, with the trial judge's permission, two jurors. It was during these interviews that said counsel first learned, from another juror, about Mrs. Green's son. *Id.* When he attempted to interview Mrs. Green, she refused to talk to him. *Id.* Upon being informed of these developments, in connection with plaintiffs' motions for a new trial pursuant to Rule 59, Fed. R. Civ. P., and for relief from judgment, Rule 60 (b), Fed. R. Civ. P., the trial court denied both motions. 652 F. 2nd at 656-7.

The Sixth Circuit reversed and remanded the case "for appropriate proceedings." 652 F. 2nd at 660. In so doing, it stated that:

> a new trial must be granted where the undisclosed information would have resulted in the juror's disqualification for cause. This occurs when either the juror admits a feeling of partiality or "the judge makes a pragmatic judgment that there is a substantial possibility of the juror unconsciously favoring one side or another." . . . [We] also hold that a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposely incorrect answer.

625 F. 2nd at 659.

Here, where the concealment of the juror's application for a position with the prosecutor's office, surely a more prejudicial relationship than that affecting Mrs. Green's son, was made by the prosecutor in an extremely serious criminal rather than a civil case, it would seem that respondent is clearly entitled to a new trial. The con-

clusive presumption of bias "as a matter of law," as enunciated by this Court in *United States* v. *Wood*, 299 U.S. 123, 133 (1936), is patently applicable to the facts of this case. Had the prosecutor not wilfully concealed the Smith job application, respondent might well have persuaded the trial judge that "there [was] a substantial possibility of the juror unconsciously favoring one side or another." 652 F. 2nd at 659. Although the jury was already seated and sworn and, therefore, immune from peremptory challenges, the availability of four alternates would undoubtedly have resulted in the discharge of Juror Smith, as subsequently occurred in regard to Juror Bethel. The prosecutor's willful silence made this efficacious resolution impossible, thus leaving a new trial as the only satisfactory remedial action.

Respectfully submitted,

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FILED
SEP 14 1981
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CLERK

No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Petitioner,

against

WILLIAM R. PHILLIPS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This brief is in reply to the brief for respondent as well as the *amicus curiae* brief sought to be filed by the American Civil Liberties Union.*

* On August 1, 1981, the American Civil Liberties Union moved to file a brief as *amicus curiae;* that motion had not been decided when this reply brief was completed and ready to be filed. Nonetheless, we have replied to the amicus brief because we were uncertain whether the motion would be denied or granted.

Respondent's unwarranted and irrelevant speculations cannot be substituted for the factual findings by the state court which are fully supported by the record.

After finding no fault "in general" with petitioner's statement of the case, respondent says that it would "serve no useful purpose to go through petitioner's factual presentation and point out each and every inaccuracy or misstatement." Brief for Respondent: 2-3. Such a process would serve no useful purpose only because our statement of the case accurately reflects the relevant facts. In contrast, throughout his brief respondent dwells on irrelevancies, and overlooks or ignores the record. Initially, respondent in his counterstatement of the case attempts to suggest there may be some doubt about his guilt. More importantly for our purposes, respondent then attempts throughout his brief to characterize the acts of the juror in question, Smith, in a manner which is unsupported by the record and which was rejected by the state trial judge. Before turning to those mischaracterizations, an examination of other parts of respondent's brief proves interesting.

First, respondent opens his counterstatement of the case with the apparent purpose of suggesting that the proof of his guilt was not overwhelming. Thus, respondent first notes two so-called omissions in petitioner's statement of the case. Relying on newspaper reports that the first trial had ended with the jury deadlocked 10-2 for acquittal, respondent criticizes the omission of that vote from petitioner's statement. Brief for Respondent: 2, 4a-5a. In addition, respondent finds fault with our failure to set forth facts allegedly calling into question the investigating detective's decision to focus on respondent in a three-year-old

murder investigation. *Id.* at 2-3. As to the reported jury vote, of course, a "report" in a newspaper article is hardly a substitute for facts of record. In any event, the proof at the second trial was substantially different and greater than that at the first trial. Most significantly, both the first vote, and the respondent's opinion about the investigating officer, are completely irrelevant to the issue before the Court.

No more relevant or persuasive is respondent's suggestion that the jury deliberations were of an inordinate length. Brief for Respondent: 6, 29. A mere eleven hour deliberation (apparently including both lunch and dinner), after a nine-week trial, is a brief rather than a lengthy period.* In

* Equally incorrect is respondent's suggestion that some of the proof was improper because it was immunized testimony. Brief for Respondent: 29n. The district court did not pass on respondent's immunity claim, *see* Appendix B to Petition for Certiorari: 14a-15a, but that claim is clearly without merit. The evidence in question consisted of a tape recording made by respondent to aid the Knapp Commission investigation into police corruption. That recording showed unequivocally that Phillips had lied when he had later testified at trial that he had terminated his corrupt relationship with the victim Smith well before the murder. True, the evidence in question was important, but despite respondent's suggestion (Brief for Respondent: 29n), the state has never agreed that such evidence had been immunized. Even a reading of the affidavit filed in support of the habeas corpus petition which is appended to respondent's brief (6a-9a) demonstrates that no immunity was ever granted. First, it is undisputed that the Knapp Commission had no power to grant immunity. To be sure, it is alleged that at some unspecified point in time, inquiry was made of the United States Attorney who allegedly said that immunity would be given (apparently at some future time) for information by Phillips which assisted in the federal prosecution of police officers. Still, nowhere in this affidavit is it alleged that any immunity was ever in fact conferred or is it anywhere alleged that the tape in question assisted in the prosecution of any other police officers. Notably, trial counsel never advanced the immunity claim at or before trial and a subsequent post-judgment motion, made nearly three and one half years after conviction, was denied, because the failure to make a timely motion resulted in forfeiture of the claim under state law. *See* N.Y. Crim. Proc. Law §710.70(3); *see also Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (barring federal habeas corpus review of claims which had been forfeited in state court).

sum, respondent's counterstatement of the case tends to emphasize irrelevancies.

Turning to respondent's most significant lack of precision and accuracy, throughout his brief, in an effort to challenge the state judge's finding of Smith's impartiality, respondent consistently overlooks or unintentionally misrepresents the record when representing the facts concerning Smith. For example, respondent states that juror Smith was "busily engaged during most of respondent's trial," seeking employment with the prosecuting agency. Brief for Respondent: 21. In fact, during the nine-week trial, Smith's interest in the position consisted simply of two or three discussions at lunch with an old friend, court officer Fontaine, and the submission of a resume. Notably, all of the other meetings referred to by respondent were, even according to the federal district court, undertaken with neither the knowledge nor the consent of juror Smith. *See* Appendix B to Petition for Certiorari: 25a. In further disregard of reality, respondent says that after submission of the resume, Smith "was meeting *regularly* with Fontaine and [grand] Jury Warden Piazza in an effort to expedite and facilitate its consideration." Brief for Respondent: 21 (emphasis added). Actually, however, Smith had lunch with Fontaine on only two occasions after the application had been submitted. Moreover, except for one fortuitous meeting at a restaurant during lunch, at which Smith was merely introduced to Piazza, Smith never met with Piazza.

In addition to misstating the record about Smith's efforts to obtain a job with the District Attorney's Office, respondent, by continued use of adverb, adjective, and in-

nuendo, also attempts to paint juror Smith as a person seeking to advance his own career at the expense of respondent. Yet, respondent ignores completely that Smith, neither in his initial application nor in his telephone call to Ms. Sudolnik after the verdict, revealed his status as a juror. Surely, if respondent is correct that by telephoning the day after the verdict, Smith was striking while the "iron was hot" (Brief for Respondent: 22), then it is remarkable that he did not bother to heat the coals by telling Ms. Sudolnik that he had been a juror at Phillips' trial.

Although the trial prosecutor's motives are less significant than those of the juror, respondent is similarly inaccurate in describing the purpose of the trial prosecutor's actions. Thus, respondent argues throughout his brief that the trial prosecutor refused to disclose the juror's application because he sought an unfair advantage by having the juror believe that he had a chance for a job if he voted for conviction. Brief for Respondent: 6, 7, 26-27, 32. Notably, the state judge found the exact opposite: "there is no evidence which to any degree points to a conclusion that . . . [the prosecutor] had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage . . ." Appendix E to Petition for Certiorari: 39a-40a. Of course, as the state court found, the trial prosecutor made a serious error in judgment based on the mistaken belief that there was no reason to disclose the application. *Id.* at 52a. Still, the trial prosecutor intended only that the application not be disclosed (Hearing: 949-54); as found by the state judge, in deciding not to disclose, the prosecutor did not have as an ultimate objective that Smith would remain a juror. Appendix E *supra*: 39a-40a. That a person could so narrowly

focus, and overlook other possibilities or consequences, is well recognized by legal principles which often distinguish between various degrees of deliberate, knowing, reckless and negligent conduct. *See, e.g.,* Model Penal Code §2.02 (1962).

In sum, we agree with Justice Holmes, as quoted by respondent, that "[t]his is not a matter for polite presumptions; we must look facts in the face." *Frank* v. *Mangum,* 237 U.S. 309, 345 (1915). Looking the facts "in the face," the state trial judge found a naive but honest juror who based his verdict on the evidence and only the evidence. In contrast, respondent's insistent refusal to "look the facts in the face" leads him to conclude, with a typical colorful but irrelevant metaphor, that the juror's testimony was similar to "the strenuous insistence of the fabled fox discovered inside the chicken coop that he meant no harm to its occupants." Brief for Respondent: 27. The only fable in this case is respondent's unfounded speculation about the juror's acts as well as the juror's and prosecutor's motives.

Neither respondent nor the amicus casts any doubt on the adequacy of the post-trial hearing to determine whether the juror was impartial.

Following a post-trial hearing, juror Smith was found to have been actually impartial.

Respondent and the amicus argue that the post-trial (*Remmer*) hearing is not the constitutional equivalent of a hearing during trial. In the alternative, both respondent and the amicus argue that even though in some situations the post-trial hearing may be the equivalent of a mid-trial

hearing, this is never the case in situations involving alleged misconduct by a juror himself, *i.e.* "internal" misconduct, as opposed to alleged misconduct with the participation of any other person, *i.e.* "external" misconduct.

Turning first to the alleged external-internal distinction, the amicus opines that at a post-trial hearing about whether the juror himself had engaged in misconduct, a juror planning a career in law enforcement would never admit that he himself had disregarded his oath as a juror to further his career. Brief for Amicus: 9-10. The amicus concludes that because the juror would not admit his wrongdoing, the post-trial hearing is ineffective. Likewise, however, during trial a juror is hardly likely to admit that he had deliberately put himself in position to violate his oath. Of course, during and after trial, a juror need not make any such admission, but could merely acknowledge the possibility that he could be, or had been, affected subconsciously by the application.

More significantly, regardless of whether the source of an influence is internal or external, inquiry into a person's state of mind is not unique to alleged misconduct of a juror. There are many situations in criminal prosecutions, and civil trials (as well as other special proceedings), where inquiry is made into a person's state of mind without resort to a conclusive presumption arising from an isolated act. Indeed, as demonstrated by *Sullivan* v. *Fogg*, 613 F.2d 465 (2d Cir. 1980), courts have used post-trial inquiries to determine whether a juror was improperly affected by strictly internal factors. Thus, in *Sullivan*, cited in our main brief but conspicuously ignored by the amicus in its discussion of other cases dealing with this matter (Brief for Amicus:

11), the court held such a post-trial inquiry was the proper procedure to determine whether a juror was affected improperly by an influence completely internal to him—namely, voices that he claimed to have heard (613 F.2d at 467).

Moreover, both respondent and the amicus ignore that there are many circumstances, other than "self-serving" denials, which shed light on a juror's state of mind. A determination of bias, or a lack of bias, may be based upon any number of factors, including the person's background, what he did and said, as well as what he did not do or say, during the period in question. Notably, in *Moody Equipment & Supply Co.* v. *Union National Bank,* —— Ark. ——, —— S.W.2d —— (July 13, 1981), reprinted in Appendix L to the Brief for Respondent, testimony by another witness cast serious doubt on the testimony of a defense witness and a juror about what transpired between him and that juror. Similarly, in the *Remmer* case itself, this Court relied strongly on the fact that during the drive home after the trial had ended, the juror in question had said to two of his fellow jurors that he had "been under terrific pressure. . ." 350 U.S. at 381. As in the *Remmer* and *Moody* cases, here information relevant to the assessment of Smith's alleged bias came from his actions and from the testimony of those with whom he dealt during and after trial.

Further, and most importantly, and completely overlooked by the amicus and respondent, is that the trial judge observed Smith as he testified during direct and cross-examination. Indeed, in *Moody Equipment & Supply Company* v. *Union National Bank, supra,* a case respondent thought so important that he reprinted it in full, the Arkan-

sas Supreme Court explicitly relied on the general rule that appellate courts refrain from reversing a trial judge's determination following an inquiry into possible juror bias because the trial judge had "heard the testimony firsthand" and "the situation presents to him a question that cannot equally well be presented to us by the printed record." Appendix L: 12a; *accord Ristaino* v. *Ross*, 424 U.S. 589, 594-95 (1976).

Here the trial judge observed juror Smith as he testified. After conducting a hearing consuming 1,000 pages of testimony, the trial judge made careful, extensive and fully supported findings of Smith's impartiality. Significantly, in the entire record, there is nothing which at all suggests that the application affected Smith consciously or subconsciously.

As just demonstrated, there are ample sources of information, apart from a juror's word, which enable a court to determine whether a juror has been influenced improperly by an external or even an internal source. Those sources of information are equally available during or after trial. Respondent and amicus argue unpersuasively, however, that post-trial hearings are in other ways not as effective as mid-trial hearings. As made clear at pages 27-28 of our main brief, defense cross-examination at a post-trial hearing may well be more effective than that at a mid-trial hearing, for after trial counsel does not have to tread lightly to avoid antagonizing the juror. Amicus attempts to counter this argument by contending that defense counsel faces the same possibility of antagonizing jurors during *voir dire* questioning that he does during a mid-trial hearing. Brief for Amicus: 14. While not completing the argument, ami-

cus is apparently suggesting that since the *voir dire* is effective, it follows that the mid-trial hearing is equally effective. If true, this merely shows that *voir dire* examination, like mid-trial examination, is less effective than examination at a post-trial hearing. In any event, there are differences between *voir dire* and a mid-trial hearing, and those differences merely reinforce petitioner's argument that the post-trial hearing is at least as effective as the mid-trial hearing.

During *voir dire,* under New York law (Crim. Proc. Law §270.15), counsel asks questions designed to elicit information that may have a bearing on a juror's predisposition toward the accused. Sometime during the examination, counsel generally explains that his aggressive questions are designed to ensure that each juror will be fair and impartial. After selection, each juror selected has passed this stringent test and a juror might well be favorably disposed to an attorney who found that juror to be fair and impartial. Given counsel's explanation, and that similar probing questions often are asked of several jurors, it is most unlikely that any particular juror will feel great antagonism toward counsel, which he would then transfer to counsel's client.

On the other hand, if a trial is interrupted for a hearing on juror bias, the juror knows that he has been singled out by an advocate who believes that he is unfit to serve and desires his exclusion. The harsher the questioning, the more antagonism the juror is likely to feel. Moreover, because the questioning occurs much closer in time to the jury deliberations than does the *voir dire,* the juror's antagonism is still fresh when deliberations begin. Thus, a mid-

trial hearing is not as effective as *voir dire*, and certainly not as effective as a post-trial hearing, which permits full cross-examination of the juror.

Finally, amicus states that a post-trial hearing is inferior "because the only option then available to the judge is to set aside the guilty verdict." Brief for Amicus: 12. However, the amicus seems to acknowledge that such a hearing is adequate to deal with situations of alleged juror misconduct about which the prosecution had no knowledge during trial. Brief for Amicus: 15. Surely then, such a hearing is likewise adequate when the prosecution had prior knowledge of such misconduct, for when the prosecutor learns about alleged misconduct has no bearing on whether a judge can determine a juror's state of mind. Moreover, to the extent that the amicus is implying that New York State trial and appellate judges would not set aside a conviction based upon prejudicial prosecutorial or juror misconduct, it seems grossly misinformed.*

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* *See, e.g., People* v. *Cwikla*, 46 N.Y.2d 434, 441, 386 N.E.2d 1070, 1073, 414 N.Y.S. 2d 102, 106 (1979); *People* v. *Maynard*, 80 Misc. 2d 279, 291, 363 N.Y.S.2d 384, 398 (Sup. Ct. N.Y.Co., 1974) (convictions set aside for prosecutor's failure to disclose evidence); *People* v. *Mullin*, 41 N.Y.2d 475, 480, 362 N.E.2d 571, 574, 393 N.Y.S. 2d 938, 942 (1977); *People* v. *Rivera*, 75 A.D. 2d 544, 546, 426 N.Y.S. 2d 785, 786-87 (1st Dep't 1980) (convictions reversed for improper prosecutorial summation); *People* v. *Brown*, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979); *People* v. *Crimmins*, 26 N.Y.2d 319, 323-24, 258 N.E.2d 708, 710, 310 N.Y.S. 2d 300, 302 (1970); *People* v. *Cocco*, 305 N.Y. 282, 287, 113 N.E.2d 422, 423 (1953) (convictions reversed for juror misconduct or an improper outside influence on a juror).

This Court has long held that the Constitution requires only the exclusion of jurors who are found to be actually biased and respondent offers neither logic nor policy to overrule well-settled precedent.

Respondent, without support from the amicus, returns to the district court decision to argue that even though the juror was not actually biased, his application gave rise to a conclusive presumption of "implied" bias. To support that argument, respondent asks this Court to bring within the Sixth Amendment the common law rule that servants could not sit on cases in which their employer was a party. Brief for Respondent: 14-15. Of course, the juror here was not in the employ of a party, so the common law rule offers no support to respondent unless it is expanded to include prospective servants. More importantly, respondent forgets that this Court has clearly and unequivocally rejected the common law rule and declared that, in jury selection, the Constitution is "not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U.S. 123, 146 (1936).*

* In attempting to prove his point that the common law rule is needed as constitutional doctrine, respondent conjures a situation in which all twelve jurors apply for a job with the prosecutor's office. Brief for Respondent: 13. Of course, twelve such applications during trial would be something more than a coincidence and inquiry could well show actual misconduct. However, if upon inquiry all twelve could be shown to be actually impartial, due process would be satisfied. *See Frazier* v. *United States*, 335 U.S. 497, 510 (1948) (no denial of due process even though all twelve jurors were government employees); *Dennis* v. *United States*, 339 U.S. 162, 165 (1950) (even in a politically sensitive case there was no denial of due process even though seven of twelve jurors were government employees). Finally, the hypothesized "packed" jury presents concerns simply not present in the instant case. *See Frazier* v. *United States*, *supra* at 514-520 (Jackson, J., dissenting).

Even when a prospective juror is employed by the prosecuting agency, there is no automatic exclusion. *See id.* at 149-50; *Frazier* v. *United States,* 335 U.S. at 512. As this Court stated in the *Wood* case:

> We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation. 299 U.S. at 149.

Trying to avoid this well settled principle that the Constitution requires challenges to individual jurors only on a showing of actual bias, respondent, again unsupported by amicus, turns desperately to the "appearance of justice" standard. Brief for Respondent: 14, 27-29. The constitutional cases cited by respondent to support his "appearance of justice" argument involve only judges, or racially discriminatory practices. These are, of course, the only exceptions to the actual prejudice requirement, and have already been discussed at pages 32-33 and 46-48 of our main brief. As noted in our main brief, possible racial or, for that matter, other invidious discriminations are treated with special concern, because the injection of such prejudice into criminal proceedings has implications for society far beyond the courtroom. *See Rose* v. *Mitchell,* 443 U.S. 545, 555-56 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522, 532-33 (1975); *see also Peters* v. *Kiff,* 407 U.S. 493 (1972). And as pointed out on page 47 of our main brief, there are good reasons why the bias of judges has always been treated specially. Notably, respondent utterly fails to challenge these reasons and show why an "appearance of justice" standard, rather than the traditional actual bias standard, should gov-

ern. Respondent does attempt to support his "appearance of justice" argument by observing that "it is impossible to know what effect Smith had on other jurors prior to or during deliberations." Brief for Respondent: 28. The argument is curious, for if Smith was actually impartial, his "effect" on other jurors was only the proper influence which all impartial jurors have upon one another. The "appearance of justice" is hardly undercut by such an influence.

Further, an "appearance of justice" standard is not appropriate for general application to individual jurors because it is so amorphous as to be no standard at all. As such, it seems particularly ill-suited to federal habeas corpus review, or even direct review, of state convictions. In sum, in cases involving the right to an impartial jury other than those involving systemic defects, as the Court has recently reaffirmed, a showing of actual prejudice is required. *See Chandler* v. *Florida*, —— U.S. ——, 101 S. Ct. 802, 813-14 (1981).

Finally, in support of an "appearance of justice" standard, respondent argues that "the recent carnage and bloodshed in Miami and other cities should not be the touchstone of a civilized response to injustice, real or imagined." Brief: 30. The relationship between the trouble in our cities and a new trial for this corrupt police officer, convicted of brutally murdering two people in New York City, is murky to say the least. Moreover, the law of the street is hardly an appropriate consideration in determining the requirements of the United States Constitution. Of course, real injustice calls for a civilized response, and if the juror in question had been found to have been actually biased,

that response would have been a new trial. Because the juror was not actually biased, however, there was nothing uncivilized about the state courts' refusal to set aside the conviction. By suggesting that only an appearance of justice standard is "civilized" and that such a standard requires a new trial for him, respondent desires a real remedy for an imaginary injustice. Imaginary injustice, however, should not be the concern of federal courts in reviewing state convictions in habeas corpus proceedings.

Neither respondent nor the amicus has shown that the respondent was prejudiced by the prosecutor's failure to disclose the juror's application during trial.

Pointing to no prejudice whatsoever, respondent argues that the failure to disclose the juror's application during trial requires affirmance. Brief for Respondent: 37. Of course, as seen by the authorities cited on pages 32-33 of our main brief, this Court has made it clear that a federal court may not interfere in a state prosecution by ordering a new trial because of prosecutorial misconduct which did not prejudice an accused.

In his argument about prosecutorial misconduct, counsel for respondent muses about what would happen to him, in terms of disciplinary or criminal proceedings, if a juror had applied to him for a job and he had decided not to disclose the fact until after trial. Of course, whatever would happen to defense counsel, the verdict would not be affected. On the other hand, we do not argue that whatever the conduct of the prosecutor the verdict should remain inviolate. But surely, a requirement of prejudice from prosecutorial

misconduct fully protects a defendant's right to a fair trial. If some other societal interest calls for further protection, then a prosecutor's conduct is subject to the same disciplinary and criminal review as that of a defense counsel. Notable by its absence from the petition is any allegation that respondent filed a grievance with the bar association, or sought appointment of a special prosecutor to make inquiry into the trial prosecutor's conduct.

Interestingly, respondent closes his brief (pp. 39-40) by referring to that portion of the majority opinion in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 195 (1978) in which Chief Justice Burger quotes a statement ascribed to Sir Thomas More, that even the devil must be given the benefit of the law. However, in the state courts William Phillips was treated fairly and in accordance with the law. Now he wants more than is due him; he seeks to have the federal courts supervise the conduct of state prosecutors and grant him a new trial, even though he was not prejudiced by the conduct of the prosecutor. In seeking even more than that required by the Constitution, respondent wants to deprive the state of the process due it—freedom from federal interference with a state conviction because of prosecutorial misconduct that has not prejudiced the accused.

Significantly, in *Tennessee Valley Authority* v. *Hill*, *supra*, in which the quoted statement of Sir Thomas More appears, the Court refused to preempt congressional action, preemption which would have violated the constitutional system's commitment to the separation of powers. Given the absence of prejudice, here too the Court should refuse

to preempt state court actions, preemption which would violate the constitutional system's commitment to federalism.

The amicus seeks to provide the prejudice by arguing that a post-trial hearing is not as effective as a hearing during trial. We have responded to this argument at pages 6-11 of this reply brief and pages 26-27 of the main brief. Nonetheless, two points raised by the amicus merit brief response.

At pages 25-27 of our main brief, we demonstrated that a post-trial hearing is the appropriate procedure to determine whether a juror engaged in misconduct during trial which influenced his verdict, and that the adequacy of the post-trial hearing is not affected by whether or not the prosecutor knew of the misconduct during trial. At pages 4 and 5, the amicus correctly states that "[t]his argument, . . . is the keystone of petitioner's brief." But amicus then incorrectly states that the argument "was unequivocally rejected by this Court in *United States* v. *Agurs*, 427 U.S. 97, 111 (1976)."

At the cited page in *Agurs* (427 U.S. at 111), the Court rejected an argument that when a prosecutor fails to disclose evidence, a defendant to obtain a new trial should have to satisfy the burden applicable in newly discovered evidence cases, of showing that the withheld evidence would have resulted in acquittal. While rejecting that argument, the Court did not hold that a hearing or inquiry would necessarily be inadequate to establish the absence of prejudice. Indeed, by requiring prejudice from the fail-

ure to disclose (427 U.S. at 108), the Court by definition recognized the need for inquiry. Here, inquiry was called for and held. At that inquiry, the state court did not require the accused to shoulder any burden. Rather, the state judge put the prosecution to the heaviest burden and then concluded beyond a reasonable doubt that the juror was impartial, and that respondent was not prejudiced by the failure to disclose. This, of course, is in complete accord with the teaching of *Agurs*. What is contrary to *Agurs* is respondent's idea that once prosecutorial misconduct is shown, then no consideration should be given, with appropriate allocation of the burden of proof, to whether that misconduct prejudiced respondent.

Given the reasonable doubt standard used by the state judge, it matters little into which of the three *Agurs* categories the prosecutor's failure to disclose falls. Nonetheless, also deserving of brief comment is the attempt of amicus to force the prosecutor's failure to disclose information about the juror into the category encompassing perjured testimony, in which convictions are set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (427 U.S. at 103-04).

The extent of amicus' analysis is that when prosecutors withhold information which would expose false testimony, they act reprehensively. Here, according to amicus, the prosecutor's conduct is equally egregious; thus, it argues that the conduct here must be in the same category as that involved in the false testimony cases. Brief for Amicus: 6. This conclusory analogy is, of course, no sub-

stitute for analyzing the nature of prosecutorial conduct to determine into which category it falls.

Here, there is no *voir dire* answer or any other testimony by the juror which the prosecutor knew to be false, as in the false testimony cases. Rather, the prosecutor merely discovered, but failed to disclose, information about a juror's conduct after trial had commenced, which could have conceivably affected a determination of the juror's impartiality. To be sure, a juror's impartiality is at the core of the right to a fair trial. But so too is the requirement of proof beyond a reasonable doubt and the defendant's right to offer exculpatory evidence. Yet the failure to disclose unrequested evidence affecting guilt or innocence, falls into the third *Agurs* category, which requires a new trial if the undisclosed evidence "creates a reasonable doubt which did not otherwise exist." 427 U.S. at 112.* Thus, in this juror context, the failure to disclose should be treated no differently from the failure to disclose evidence which could conceivably affect a jury's determination of guilt or innocence. In any event, regardless of the standard, the hearing showed that there was neither a reasonable doubt about juror Smith's impartiality nor a reasonable likelihood that he was actually biased. The Constitution requires no more.

• • •

* The second *Agurs* category involves the failure to respond to a request for specific information, but the duty to honor that request is breached and a new trial required only when the suppressed evidence "might have affected the trial" (427 U.S. at 104). This seems no different from the test for determining whether to order a new trial because perjured testimony is knowingly permitted by a prosecutor. *See,* 427 U.S. at 103-04. Despite the absence of a request, the court below put this case in this second category but like the amicus was none too clear or persuasive in its reasons for doing so (*see* Appendix A to Petition for Certiorari: 9a).

In sum, juror Smith was naive but impartial. Respondent's adjectives, adverbs, and innuendos are no substitute for the state judge's fully supported findings of the juror's actual impartiality; actual impartiality is all that is required by the Constitution. Nor is it open to persuasive argument that the post-trial hearing was constitutionally inadequate to determine that impartiality; thus, the prosecutor's failure to disclose the juror's letter during trial in no way prejudiced respondent's right to explore fully that impartiality.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

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September 10, 1981

MOTION FILED
AUG 5 1981

No. 80-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION *AMICI CURIAE*

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August 1, 1981

MOTION FOR LEAVE TO FILE

The American Civil Liberties Union and the New York Civil Liberties Union hereby respectfully move for leave to file the attached brief *amici curiae*. The attorney for respondent has consented; the attorney for petitioner has refused consent.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights. The New York Civil Liberties Union is its statewide affiliate operating in New York.

Central to the principles in the Bill of Rights is the Sixth Amendment right to a trial "in all criminal prosecutions . . . by an impartial jury."

The need for protection against overreaching government action -- the central purpose

of the Bill of Rights -- is greatest when the government brings criminal charges against a defendant. As this Court has noted,

> "Those who emigrated to this Country from England brought with them this great privilege[, the right to trial by an impartial jury,] 'as their birth right and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"*

The ACLU has participated in numerous cases in this Court which have concerned the Sixth Amendment right to trial by jury, including Burch v. Louisiana, 441 U.S. 130 (1979), Apodaca v. Oregon, 406 U.S. 404 (1972), and Witherspoon v. Illinois, 391 U.S. 510 (1968).

Although we share the concern of the courts below and respondent over the implied bias

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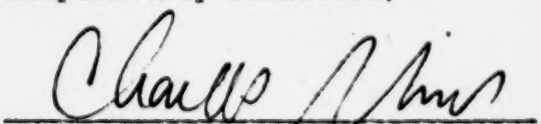
* Thompson v. Utah, 170 U.S. 343, 349-350 (1898), quoting 3 J. Story, Commentaries on the Constitution of the United States (Boston: 1833), § 1773.

of the juror at issue here, and the apparent prosecutorial misconduct which the prosecutor here seeks for the first time to defend (Br. at 27), our approach is somewhat different. We focus on the particular reasons why the juror here would have found it immeasurably more difficult to admit bias after trial than during trial, and on the marked constriction of the trial judge's alternatives the prosecutor effected by waiting until after trial to disclose the juror's application for a job with his office. Finally, we rely on United States v. Agurs, 427 U.S. 97 (1976), to demonstrate that a different standard must govern prosecutorial failure to disclose likely juror bias known but concealed during a trial than governs post-trial discovery of such bias to give effect to the prosecutor's obligation to serve the ends of justice.

Because this case raises important questions concerning the right to due process and fair jury trial, we respectfully urge the the Court to accept and file the enclosed brief amici curiae.

Dated: August 1, 1981

Respectfully submitted,



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INTEREST OF AMICI CURIAE

The interest of amici curiae appears in the foregoing motion.

SUMMARY OF ARGUMENT

The District Attorney's decision not to disclose until after trial that a juror had applied for a job in his office prevented the state court from conducting a hearing, during trial, to determine whether the juror was impartial, and also prevented the state court from replacing the juror with an alternate.

Where, as here, a hearing during trial would have been possible, and the nature of the alleged juror misconduct is such that a post-trial hearing is far less likely to result in an accurate determination of whether the juror was prejudiced, a post-trial hearing falls short of the requirements of due process, and is inadequate

to protect the right to trial by an impartial jury. The post-trial hearing conducted by the state court was inadequate, and did not eliminate the likelihood that the juror's pending job application affected his judgment as a juror.

ARGUMENT

THE WRIT OF HABEAS CORPUS WAS PROPERLY GRANTED BECAUSE, IN THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S DECISION NOT TO DISCLOSE DURING TRIAL THAT A JUROR WAS APPLYING FOR A JOB IN HIS OFFICE DENIED DEFENDANT DUE PROCESS AND UNNECESSARILY ABRIDGED THE ABILITY OF THE TRIAL COURT TO MAKE AN ACCURATE AND RELIABLE ASSESSMENT OF WHETHER THE JUROR WAS SO PREJUDICED AS TO DENY DEFENDANT A FAIR TRIAL

By deciding not to advise the state trial judge until after trial that a juror had a job application pending in the prosecutor's office, the District Attorney prevented the state court from conducting a hearing during trial to determine whether the juror was impartial, and also

prevented the court from excusing the juror and replacing him with one of three available alternates. The District Attorney instead relegated the state court to conducting a post-trial hearing which, as we shall show, was unlikely, under the circumstances of this case, to adduce credible or reliable evidence on the juror's impartiality.

The District Attorney's actions prevented the state court from determining, in a Constitutionally-adequate manner, whether the juror was impartial, and denied respondent due process in his criminal trial. U.S. Const., Amendments VI, XIV.

Although acknowledging that his office engaged in "wrongful conduct" (Pet. Br. at 48), the District Attorney contends that the state court's post-trial hearing into the juror's impartiality (at which the court concluded that the juror was not prejudiced) remedied any violation of respondent's rights:

> "If we assume that the prosecutor had himself discovered the letter [the job application] only after the verdict, a post-trial hearing would have been the proper means of determining whether the juror had been actually biased. [citations omitted]. If a post-trial hearing would have been adequate to protect Phillips' sixth amendment right to an impartial jury in that circumstance, there is no reason why such a hearing was any less adequate simply because the prosecutors knew about the letter at an earlier point in time." (Pet. Br. at 27).

This argument -- which is the keystone of petitioner's brief -- was unequivocally rejected by this Court in United States v. Agurs, 427 U.S. 97, 111 (1976), which compared the standard applicable to post-trial motions based on the prosecutor's failure to disclose evidence, with the standard applicable to post-trial motions based on newly-discovered evidence:

> "The fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. . . . If the standard applied to the usual motion for a

> new trial based on newly-discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."

In affirming the grant of habeas corpus in this case, the Second Circuit noted that Agurs established a three-tiered standard to evaluate the prosecutor's failure to disclose evidence: (a) if the undisclosed evidence shows that the prosecutor's case included prejudiced testimony, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," Phillips v. Smith, 632 F.2d 1019, 1023 (2d Cir. 1980), citing United States v. Agurs, supra, 427 U.S. at 103-104; (b) if the undisclosed evidence was requested by the defense, and if there is "a substantial basis for claiming materiality, . . . the failure to [disclose] is seldom, if ever, excusable," Phillips v. Smith, supra, citing Brady

v. Maryland, 373 U.S. 83 (1963); and (c) if the undisclosed evidence was not requested, a verdict must be set aside if the evidence "creates a reasonable doubt which did not otherwise exist," Phillips v. Smith, supra, citing United States v. Agurs, supra, 427 U.S. at 112.

Where, as here, the information withheld by the prosecutor was not evidence which could have been introduced at the trial, but information which raised a substantial question about the impartiality of a juror, the prosecutor's failure to disclose should be evaluated by the same standard as the prosecutor's use of perjured testimony. Like perjured testimony, juror prejudice known to the prosecutor involves not only "prosecutorial misconduct, but more importantly . . . a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. at 104. Like the higher standard which applies to failure to disclose

evidence but not to newly discovered evidence, a higher standard must govern failure to disclose likely juror prejudice to signify the importance of "the prosecutor's obligation to serve the cause of justice." Id. at 111.

The question therefore is whether there is "any reasonable likelihood that" the juror's pending job application with the District Attorney's office "could have affected the judgment of the jury." United States v. Agurs, supra, 427 U.S. at 103 (emphasis added).

This question is difficult to answer in any case, for while there may be many witnesses and varied evidence on the source of the alleged juror bias, there is only one witness who can give direct evidence on its impact: the juror himself. Such evidence is inherently unreliable. As this Court stated in Irvin v. Dowd, 366 U.S. 717, 728 (1961),

"No doubt each juror was sincere when

> he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

This question is all the more difficult to answer in this case because by withholding the information about the juror's job application until after trial, the prosecutor took it upon himself to deprive the court of the most effective means of assessing whether the juror was impartial -- a hearing during the trial -- and thereby also, we will now show, deprived the court of the least disruptive remedy for ensuring a fair trial when a juror is prejudiced -- replacing the juror with an alternate.

A post-trial hearing might ordinarily be adequate to

> "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." Remmer v. United States, 347 U.S. 227, 230 (1954).

But under the facts of this case, the post-trial

hearing was wholly inadequate to assess whether the juror was impartial, for several reasons.

First, just as juror Smith may have had a motive, during trial, to vote for conviction to further his law enforcement career, after trial he clearly had a motive to say that he had not done so. For it must have been evident to juror Smith that if he admitted bias -- if he admitted that he had disregarded his oath as a juror to further his law enforcement career -- it would have had a devastating effect on that career. What law enforcement agency would hire an investigator whose credibility could always be impeached by his admission that he had disregarded his solemn juror's oath, and voted to convict to further his own career?

Had the hearing into juror Smith's impartiality been held during trial, the juror would have been under no such pressure to proclaim his impartiality. He could then have testified,

if it were so, that his pending application for a job with the prosecutor would influence his ability to serve as a juror, without fear that that forthright statement would imperil his future career.

The facts underlying juror Smith's alleged bias thus distinguish this case from Remmer v. United States, supra, which held a post-trial hearing adequate to determine whether a juror, who had been interviewed by the FBI during trial about an alleged attempted bribe, was affected in his deliberations. In Remmer, the juror had no motive, either during or after trial, to justify his conduct, for there was no claim that the juror had engaged in misconduct. The juror's testimony at a post-trial hearing was thus as reliable as the juror's testimony at a hearing during trial. Had the juror acknowledged that he had been influenced by the FBI interview or the alleged attempted bribe, his testimony would have

cast aspersions on the FBI and the source of the attempted bribe, but not on himself.

Indeed, the cases relied upon by the District Attorney on "the appropriateness of post-verdict inquiry" (Pet. Br. at 26) did not involve claims of juror misconduct, but instead claims that a third party had improperly influenced the juror. See, e.g., United States v. Johns, 615 F.2d 672, 676 (5th Cir.), cert. denied, ___ U.S. ___, 101 S. Ct. 95 (1980) (alternate juror learned about witness' death); United States v. Gross, 614 F.2d 365, 368 (3d Cir.), cert. denied, 447 U.S. 925 (1980) (marshall expressed romantic interest in female jurors); United States v. Brasco, 516 F.2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975) (jurors noticed newspaper article).

In those cases, where the juror was not himself suspected of misconduct, there was no reason to believe his testimony at a hearing after trial would be any less reliable than his

testimony at a hearing during trial.

In contrast, juror Smith had a clear motive after trial to justify his conduct, and would have had no such motive during trial.

Second, a post trial hearing is inferior to a hearing during trial because the only option then available to the judge is to set aside the guilty verdict, rather than merely to replace the juror with an alternate, with no substantial inconvenience to witnesses or burden on judicial resources.

Furthermore, the District Attorney has implicitly acknowledged that the prosecutor made a serious error of judgment largely to avoid the minimal delay that raising this issue during trial would have occasioned:

> "To be sure, as the state judge found, by failing to disclose the letter during trial, the trial prosecutor had made a 'serious error in judgment.' (App. E at 52a). Nonetheless, the decision not to disclose was made in the sixth week of a murder trial in the middle of cross-examining

> defendant, with the summation only a week away and with knowledge of a problem with another juror -- Bethel. (Pet. Br. at 31 n. 11.; emphasis added).

If a brief delay in trial led the prosecutor to commit a "serious error of judgment" (Pet. Br. at 31 n. 11), it is clear that a trial judge must feel even greater pressures at a post-trial hearing when the only remedy would be to set aside the conviction and begin a new trial. Accordingly, where it is possible, a hearing during trial, when a prejudiced juror may be replaced by an alternate and a new trial thus avoided, is infinitely more effective than a post-trial hearing.

Not only does the District Attorney fail to address these serious infirmities of a post-trial hearing, but he attempts to rationalize that a post-trial hearing may be more effective than a hearing during trial. First, the District Attorney argues that at a hearing after trial, "defense counsel, in cross-examining the juror,

would not have to tread lightly in fear that, if his challenge were unsuccessful, he would then be stuck with a juror who might well hold the cross-examination against his client." (Pet. Br. at 27-28). But the task faced by defense counsel, at a hearing during trial, is hardly novel. In New York state courts, the voir dire of the jury is conducted by the attorneys, not by the court. N.Y. Crim. Proc. Law §§ 270.15, 360.20 (McKinney's 1971). A defense counsel who has exhausted his peremptory challenges, and examines a juror to determine if there is a basis to challenge for cause, knows that if there is no such basis "a juror who might well hold the cross-examination against his client" will serve on the jury. The District Attorney's post-hoc rationalization of the defendant's interests is, of course, no substitute for the timely assessment of the defendant's interests, by his own counsel, which the District Attorney prevented.

The District Attorney's second rationalization to support a post-trial hearing is that "at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern." (Pet. Br. at 28). But there is no reason to assume that the court would not have given adequate time to a hearing during a seven-week trial had the prosecutor not prevented it from so doing.

To be sure, a post-trial hearing may be Constitutionally adequate where the testimony at such a hearing would be as reliable as testimony taken at a hearing during trial. A post-trial hearing may also be adequate if it is not possible to hold a hearing during trial. But where, as in this case, a hearing during trial would have been possible, and the nature of the alleged misconduct is such that a post-trial hearing is less likely to result in an accurate determination of whether the juror was prejudiced, then a post-trial

hearing falls short of the requirements of due process, and is inadequate to protect the right to trial by an impartial jury.

The post-trial hearing in this case could not, and did not, eliminate "any reasonable likelihood" that the juror's pending job application "could have affected [his] judgment." United States v. Agurs, supra, 427 U.S. at 103.

Because the post-trial hearing was inadequate, the state court's conclusion that juror Smith was not biased -- based almost solely on juror Smith's own testimony -- is not entitled to deference. 28 U.S.C. § 2254(d)(2),(7). In Remmer v. United States, 350 U.S. 377, 381 (1956), involving another juror also named Smith, this Court held that under the facts of that case,

> "neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror,"

and accordingly disregarded the lower court's finding, made after a post-trial hearing, that

a communication with a juror had not affected his judgment.

* * *

The District Attorney admirably concludes his brief by stating "we seek no vindication for the trial prosecutor." (Pet. Br. at 48). In urging that the judgment below be affirmed, the ACLU seeks no punishment for the trial prosecutor, but merely

> "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, supra, 373 U.S. at 87.

CONCLUSION

Because the prosecutor's decision not to disclose during trial that a juror had applied for a job in his office denied respondent due process, and prevented the state trial judge from holding a Constitutionally-adequate hearing to determine whether the juror was impartial, the writ of habeas corpus was properly granted.

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
August 1, 1981

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